Article 370

Deceit and Fraudulent Communication

Sant Kumar Sharma



Makhanlal Chaturvedi National University of
Journalism and Communication, Bhopal



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Preface

Presence of temporary Article 370 in the Constitution of India even after more than six decades of its inclusion has become an issue of public discourse during and after the LokSabha Elections-2014. There are indications that this debate is going to gain momentum and expose the great divide of perceptions amongst the Indian polity. But if not handled appropriately and with open minds, the possibility of generation of fire also cannot be ruled out.

The issue of Article 370 is not only a matter of politics and administration, it has its bearings upon the broad psyche of the nation. It impacts confidence of the people of the country on their confidence for national integration. A nation state cannot attain full integration with some sections being treated differently. National integration and unity cannot be sustained with a some geographical parts remaining fractured.

The Dharma of meaningful debate demands complete honesty in diagnosing the issue. The debaters must keep the minds open for new facts and differing interpretations. Even in case of serious ailments of human beings, it is best to collect

multiple opinions of the expert medical persons so that the possibility of error of judgment is minimized. Same holds good for the problems of the nation. All stakeholders admit that there is a problem of Jammu Kashmir which needs to be solved. National Conference, PDP, Indian National Congress, BJP, people of the state, rest of the countrymen, external agencies all agree that there is a problem but solutions offered are varied because of either vested interests or more likely because of erratic understanding of the issue.

Media are the essential platforms for promoting this debate in a healthy and responsible manner. Media make people talk to each other. They also dig into history and either verify the existing perceptions or throw light on unknown to modify the thought process. Finding the truth and presenting the truth is the founding principle of journalism. In order to bring the debate on Article 370 to a logical end, it is incumbent on media to reinvestigate the problem that has defied any solution for long.

The most dedicated and impartial players of Indian social system feel cheated on this issue because of the lethargy of the ruling classes to evade the issue and the tendency to maintain the status quo. It is high time that the intellectual sections of the society take the issue in their own hands, analyze

without any passion but in national interest and suggest workable solution(s).

Hence, MakhanlalChaturvedi National University of Journalism and Communication, Bhopal, decided to investigate the whole issue afresh. A senior journalist, Mr. Sant Sharma, was tasked to prepare a factsheet as a media person with experience of working in Jammu Kashmir and also look into the popular public perceptions as reflected in local, regional and national media.

Mr. Sant Sharma has labored for about a year and has prepared a book of the impact of Article 370 on the people of Jammu Kashmir. This book will help the people of the country, including the political and administrative classes, to comprehend the gravity of the issue in the light of the new facts. It is expected that these two classes will gift to the nation a permanent solution of Jammu Kashmir problem that further enhances the integrity and unity of Bharata i.e. India.

Reactions, objections and suggestions are welcome.

Prof. B. K. Kuthiala
Vice Chancellor

Acknowledgements of Gratitude

At the very outset, I want to express my gratitude to MakhanlalChaturvedi National University of Journalism and Communication, Bhopal, for having provided me a one-year Fellowship which enabled me to carry out this research. It is a matter of pleasure and satisfaction for me that I could devote time to studying and analyzing Article 370 of Constitution of India, its impact and implications, for the people of Jammu and Kashmir, as also for Indians and India, under the guidance of Prof. Ram DevBharadwaj, to whom I am grateful.

It was in October 1990 that I joined*The Indian Express*, Chandigarh, after doing my PG Diploma in Journalism fromBharatiyaVidyaBhavan, Jammu branch.This happened after teaching in J&K government schools for seven years. Later, opportunities came my way to earn, and learn, while working with The Statesman, Delhi and The Times of India, Delhi; and still later as its Senior Correspondent in Jammu.

Towards the end of 2002, I joined TV Channel Star News at Jammu, switching over to *DainikBhaskar* four years later, and then *NaiDunia*, Indore, in 2007. In 2011-12, I completed my MA in Mass Communication and Journalism, from Guru Jambheshwar University of Science and Technology, at Hisar. It was here that I decided to carry on studies and started looking around for opportunities.

As someone who had worked for over a decade in Jammu and Kashmir, reporting from Jammu, at times from Kashmir, and Ladakh too, I often faced questions pertaining to Article 370. As not enough material (definitely not as much as available on other similarly 'hot' topics) was available about it, I realized that this information deficit was something I should try to bridge as part of my research. Especially from the point of view of communication, misconceptions prevalent about Article 370 and other related matters.

I applied to MakhanlalChaturvedi National University of Journalism and Communication, Bhopal, for a Fellowship to study Article 370 in some detail. My request was duly considered, and then accepted.

My sincerethanks are due to Vice Chancellor Prof. B.K.Kuthiala who encouraged me at every step to keep my mind open to new ideas and analyze things threadbare. Without this support, it would not have been possible for me to complete this study on "Article 370, Its Impact and Its Understanding AmongMasses and Media". I hope that an effective communication strategy will be evolved to dispel myths and misunderstandings about Article 370 in due course and my thesis will contribute its bit in doing so.

Grateful thanks are due to ProfRekhaChoudhary, former HoD, Political Science Department, Jammu University; ProfDipankarSengupta, HoD Economics Department, Jammu University; ProfKulwant Singh, HoD Law Department, Jammu University and Prof(retd.) S.K. Sharma, former Dean Law

Department, Jammu University; presently Information Commissioner of Jammu and Kashmir.

I will be failing in my duty if I do not record the support extended to me by my parentsSh. ID Sharma and Smt.Shakuntla; my wife Anuradha; my children, ShreyaMudgil and ShreyanMudgil; my elder sister Smt. SumanArora and her husband Sh.DewanArora; and thank them for it. My younger brother, Colonel Satish, helped me during my field visits to Ladakh, as I tried to understand the perspective of Ladakhis to Article 370. Thanks Chhotu.

Many other well-wishers and friends who helped me have not been named here and I thank them all from the core of my heart. They helped me enhance my understanding of the subject;which I humbly believe, will be a useful reference about Article 370.

There are many aspects of the Article 370 that I have failed to touch due to paucity of time and my limitations. This failure is mine alone and I hope to make amends in future by continuing to pursue the subject diligently. Last but not the least; I thank GodAlmighty, for enabling me to complete this work.

Sant Kumar Sharma

CHAPTER-1

Special Powers!

THE state of Jammu & Kashmir constitutes the northern-most part of India, located between 36^0 58'– 37^0 17'N latitude and 73^0 26'– 80^0 30'E longitude and covers an area of 22.2 M ha (2,22,236 km^2). It is one of the best known hill states of the country, having three distinct regions – diverse in culture, climate and demography.

Due to inherent diversity in demography, the aspirations of the people of the three regions are divergent and distinct from one another. In fact, even the regions themselves are not homogenous and the divergence percolates down to the sub-regional levels as well. This strangely enough is not reflected in reportage on the state by the national media. The state of Jammu and Kashmir is subsumed in Kashmir which in turn is subsumed by Srinagar. Likewise, permanent residents of J&K become "Kashmiris" even if they may be Dogras, Paharis, Gujjars and even Ladakhis.

Constitutionally, the state is an integral part of India but has a separate Constitution of its own which governs its people. This separate Constitution is the fountainhead of "special powers" that accrue to the Government of J&K. Technically, the "special powers" in the view of most commentators on this State (especially in the English media) are supposed to bestow on the people of the state some additional or special rights which apparently the citizens of other states of the Indian Union do not enjoy.

That the state is an integral part of India is clear when we read the Preamble of the Constitution of J&K which says:

WE, THE PEOPLE OF THE STATE OF JAMMU AND KASHMIR, having solemnly resolved, in pursuance of the accession of this State to India on the twenty-sixth day of October, 1947 to further define the existing relationship of the State with the Union of India as an integral part thereof, and to secure to ourselves-

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among us all;

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this seventeenth day of November, 1956, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

It needs to be noted here, that unlike in the Indian Constitution, the word "secular" is absent from the Preamble of the Jammu and Kashmir Constitution. Incidentally, we also need to note that this separate Constitution is the fountainhead of "special powers" that accrue to the Government of J&K. Technically, the "special powers" in the view of most commentators on this State (especially in the English media) are supposed to bestow on the people of the state some additional or special rights which apparently the ordinary citizens of other states of the Indian Union do not enjoy.

Left behind

In reality, however, the citizens of Jammu and Kashmir, who are also citizens of the Indian Union, in many areas do not enjoy the rights that ordinary Indians today get. The reason being that any law (other than in areas in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the erstwhile Dominion of India) passed by the Indian Parliament can become applicable to the state of J&K only after its legislature passes it.

The legislature of J&K, both the Legislative Assembly and its Legislative Council, have not always passed laws matching the Indian laws or adopted them as it were, for years together. This knowledge comes as a surprise for many, particularly those in the media who have created a niche for themselves by commenting on the state.

This leads to a situation whereby in some areas the citizens of J&K fail to benefit from the progressive laws passed by the Indian parliament. A case in point is the revolutionary Right to Information (RTI) law adopted throughout other parts of India in the year 2005. It has been over six years since the transparency law was passed and became applicable in other parts of India. The law has lead to enhanced transparency and accountability in all spheres of governance in other states of the Union.

In contrast, the J&K Right to Information Act, 2009, is far less citizen-friendly than the comparable Central law. This becomes clear when we take into

account the fact that the fee for filing a RTI application under the Central law is only Rs 10 while in J&K, the fee is Rs 50. Besides, the cost of photocopy per page in other states of the country is only Rs 2 per A4 page but in J&K, the same photocopy costs Rs 10 per A4page.

Therefore, the citizens of J&K have to pay five times more than the ordinary citizens of India for filing a RTI application and also pay five times more, per page, for getting documents from the government.

This glaring discrepancy and the noticeable disadvantage that the permanent residents of J&K face vis-à-vis ordinary citizens of India in seeking information is indicative of the malaise in other spheres of governance. This strangely enough has never received any attention from any sections of the national media.

The main objectives of this study are to evaluate the role of "special powers" of J&K which it supposedly enjoys due to Article 370 of the Constitution of India. These insulate it from walking in step with the rest of the Indian nation. Considerable time has been devoted during the one-year tenure of the Fellowship to understand the reportage in the local and national media about J&K, with specific reference to Article 370, its impact on the citizens of J&K and other related issues.

Accession & Choices

In August 1947, when the British left India and the new nation of Pakistan was born, there were communal clashes in several areas. Hindus and Sikhs got uprooted from the areas which were to become a part of Pakistan and moved towards Indian territories. There was also the migration of Muslims from several

areas to territories which were to be included in Pakistan.

To begin with, Jammu and Kashmir was not a part of India or Pakistan as its ruler, Maharaja Hari Singh, vacillated over joining either nation due to the peculiar conditions prevailing in his kingdom. It had a Muslim majority population with substantial numbers of Hindus and Sikhs.

Sialkot and other contiguous areas of West Punjab had substantial number of Hindus and Sikhs in the population. These people chose to move towards Jammu and other Hindu majority areas of J&K when communal clashes broke out. This happened at a time when Muslims were migrating, in large numbers, from Jammu towards Sialkot and other parts of West Punjab.

In those uncertain times, the migration of Hindus and Sikhs to J&K got a further fillip after Maharaja Hari Singh signed the Instrument of Accession to join India in the last week of October 1947. As J&K became a part of Indian territories, Hindus and Sikhs living in Sialkot and other areas rushed towards Jammu for safety.

In the chapter on West Pakistan refugees, we will examine the conditions of the Hindus and Sikhs who got uprooted and moved into J&K. These people were granted Indian citizenship in due course of time but their legal status remains virtually undefined till date, 65 years after they crossed an international border, between West Punjab (Pakistan) and Jammu and Kashmir (India).

They have not been declared as refugees and are erroneously called displaced persons (DPs). This

nomenclature has deprived them of any support from United Nations (UN), till date.

The state of Jammu and Kashmir was neither a part of India nor of Pakistan between August 15, 1947, and October 26, 1947, when Maharaja Hari Singh signed the Instrument of Accession to accede to India. Clause 7 of the Instrument of Accession reads:

> *Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future constitution.*

This clause is the basis of a separate Constitution of Jammu and Kashmir, which was drafted by the Constituent Assembly of the state between 1951 and 1957, long after the Indian Constitution came into force on January 26, 1950. Clause 7 of the Instrument of Accession signed by Maharaja Hari Singh is also the basis on which Sheikh Mohammed Abdullah managed to get Article 370 included in the Indian Constitution.

Incidentally, hundreds of other princely states had also similarly acceded to India by signing instruments of accession as was then required under law. However, none of them insisted on not accepting any future Indian Constitution as a precondition in the instruments signed by them. In fact, they were asked to send their representatives to the Constituent Assembly of India which started drafting a new Constitution for free India immediately after the country gained independence.

Most of the princely states realized that they did not have the necessary wherewithal to contribute in a

significant and positive manner to the framing of the Constitution. Therefore, they decided to let the Constituent Assembly do its task in an unfettered manner. Their logic of surrendering the right to participate in the framing of the Constitution was also simple. The new Constitution was to take care of the entire nation and what was good for people elsewhere would address their concerns as well, they believed.

This spirit of accommodation and surrendering individuality for the larger good of the nation allowed the framers of the Indian Constitution to go about their assigned task in an unhindered manner. They did not need to look over their shoulders constantly in an attempt to accommodate too many different viewpoints and special demands.

In Jammu and Kashmir, however, the framers of the Indian Constitution hit a wall on the issue since the State decided to have its own separate Constitution. The framers of the Constitution, including Dr BR Ambedkar, had to concede this point because the state had indeed acceded to India in peculiar circumstances.

What were these peculiar circumstances? These circumstances were the creation of Pakistan which invaded the state in October 1947, despite having signed a 'Standstill Agreement' with Maharaja Hari Singh. It is also clear now that Pakistan wanted to annex Jammu and Kashmir, by hook or crook, and started preparations for doing so in right earnest immediately after coming into existence. For this, it was willing to go to any extent, including war, and used armed bands of tribesman and its own soldiers to invade the territory it coveted.

India, on the other hand, refused to sign a 'Standstill Agreement' with Jammu and Kashmir. It harboured no aggressive intentions towards the State and waited for Maharaja Hari Singh to take a decision one-way (acceding to India) or the other (acceding to Pakistan). In the run-up to August 15, 1947, when British were to depart from India, Sardar Patel is reported to have told Lord Mountbatten that India will not take it amiss if Jammu and Kashmir were to go to Pakistan.

India had hundreds of princely states at that time. The British did not directly rule these, but wielded considerable influence over them though. These 562 princely states contained one-fourth of Indian population and one-third of India's territory. These areas were geographically intertwined with the directly ruled states.

Partition was to be of the British India and princely states were kept out of it.

Incidentally, Hyderabad and Junagadh were Hindu-majority states ruled by Muslims. In contrast, Jammu and Kashmir was a princely state where majority of subjects were Muslims but it was ruled by a Hindu king, Maharaja Hari Singh, whose forefather Maharaja Gulab Singh had founded the Dogra dynasty in 1846.

In Indian Independence Act 1935, the option of independence was present only as a technicality, a theoretical option, rather than a practical possibility since the British encouraged all of them to join either of the Dominions that were to come into being with the lapse of the British paramountcy. Other than Jammu and Kashmir, Hyderabad and Junagadh, no

Princely States attempted a shot at independence. Of course, some historians say that the Nawab of Bhopal had entertained thoughts of declaring independence but the British told him clearly that they will not countenance such an action.

Thus, lapse of paramountcy did not change the status of princes much. During discussions of Indian Independence Act in British Parliament, the British lawmakers made it clear that they will not recognize any state as independent.

It bears mention here that for several centuries, Hindus were in the forefront of India's borders on the western side. Whenever an outsider wanted to enter the Indian mainland, the invader had to battle these Hindu clans, subjugate them, defeat them and then only was a passage to the mainland available. Today, this battle has moved to Jammu, south of Pir Panjal Mountains, and thus the borders for conflict have been moved southwards to the detriment of the Indian mainland citizens.

Performa of Accession

The Performa of Instrument of Accession, its terms, procedure and form etc., was prepared by the Indian section of the State Department headed by Sardar Patel. There was no provision of any conditional accession in this Performa. It bears mention here that a treaty is a bilateral agreement signed between two parties that are more or less equal. Accession was, in that sense, a unilateral decision. No option was available to the princely states, other than accession with one or the other Dominion (India or Pakistan).

By August 15, 1947, only three princely states were left out and they had neither joined India nor Pakistan while all others had signed the instruments of accession. These instruments were also ratified by the dozen, by the hour, in those fateful days of events moving at lightning speed.

The Instrument of Accession Maharaja Hari Singh signed to join the Indian Dominion was similar to those signed by the rulers of other princely states. However, proclamation surrendering the right to frame own Constitution was signed by the other Princely States, but not by Maharaja Hari Singh.

Incidentally, the issue of accession of Jammu and Kashmir was, in a way, mishandled right from day one by the Indian government then led by Pandit Jawaharlal Nehru. In fact, the process of negation or putting into question the fact of accession was initiated by Nehru himself when he made it sort of conditional by saying that there will be a plebiscite once peace had been restored to ascertain the wishes of the people of Kashmir, the term often used as a shorthand for the State of Jammu and Kashmir.

Where is the provision for conditional accession in the constitutional scheme of things, in the Indian Independence Act 1947? Nowhere! The Act just does not provide for conditional accession. It provides for accession to one or the other Dominion, and there is no legal provision for acceding, partially, or conditionally.

Just as hundreds of other princely states acceded, the state of Jammu and Kashmir acceded to India. The format of the accession document for all states, including Jammu and Kashmir, was the same and the

choice was to be exercised only once, finally, and was not subject to any review, post facto.

Today, this accession is being challenged by some quarters. Why has this situation arisen? Can we say that the doubts are created because of the existence of Article 370 in the Constitution of India which segregates Jammu and Kashmir from other states in matters of governance and creates doubts about the legality of the applicability of the Indian laws in the state?

The secessionist, separatist movement in Kashmir is a regressive not progressive movement. The separatists are essentially trying to carve out a Muslim nation, either by moving away from the Indian nation and creating an independent Islamic state or by becoming a part of the Islamic state of Pakistan. Either way, the formulation is communal, not secular by any stretch of imagination though most separatist leaders never tire of swearing by secularism. The separatists are trying to Talibanise Kashmiri society, despite claims to the contrary, and that is the basic problem India has to grapple with and defeat, for its own survival and well-being.

Conditions have been created in the Kashmir valley in which secular ethos, with equal rights for people of all religions, have been compromised. The secular ethos has been eroded, corrupted and rendered hollow with space for growth and development being available only to those professing Islam.

Finality of Accession

Accession was the right of the Maharaja and he exercised it. The rulers had the option of either going with India or with Pakistan, and had to consider

geographical contiguity too. The option of staying independent, which is so often of talked of now, was not available. Jammu & Kashmir state was in a unique and peculiar situation, this Muslim-majority state was geographically contiguous to both India and Pakistan, unlike any other princely state.

Maharaja Hari Singh chose to link the fate of his state to India and that is that; Period. In fact, and in law, the accession of Jammu and Kashmir to India is complete and irrevocable. In that sense, Jammu and Kashmir is a settled issue.

When Jammu & Kashmir became a part of India, it signed the same instrument of accession as was signed by hundreds of other acceding states. There was no conditionality or special status. The first challenge or questions about accession started in 1949, following the UN intervention and other related developments.

Is Jammu and Kashmir beyond the Constitution of India and hence the laws of the land? No, it is a state of the Union and the writ of the Indian Constitution does run there, but not in an unimpeded manner as in other States and Union Territories (UTs). The Constitution of India gets tied in knots due to the presence of Article 370 within it with regard to each and every thing pertaining to Jammu and Kashmir.

The concept of India being a multi-national state is not only erroneous but questions our nationhood too.

Is India a multi-national state? The drift and manner of discourse regarding Jammu and Kashmir in the mainland often seems to suggest so. This is dangerous as it implies that India is not an indivisible entity. What happens due to Article 370 is that consensus on unity of the nation gets challenged and

eroded. This results from the doubts that are created in the minds of the ordinary Indians who believe that Jammu & Kashmir is perhaps, in some ways, a lesser part of the Indian Union than other constituent units.

Article 370 actually creates the impression that sub-national denominators have to be accepted, need to be accepted, for the unity of the nation to continue and this is erroneous. No nation, however strong and powerful, can remain united and escape fragmentation when it begins to accept sub-national denominators, both consciously and sub-consciously, even when they seek to challenge its unity and integrity.

What is happening at present? From within and without, a section of our own people (Indians) is eroding accession, and that is a worrying development. The right to have its own Constitution was given to the State of Jammu & Kashmir by the Indian Constitution. But this has led to the creation of a Frankenstein that threatens the whole (India) of which it (J&K) is a part.

When it comes to Jammu and Kashmir, every Indian has to be clear that morally, legally and historically, our stance that J&K is an integral part of India is infallible. In fact, the State is the ground zero for the Indian nation. It is here that the multiple battles for unity and integrity of the Indian nation were fought in the past, are being fought at present and will be fought in the future. For the Indian nation to continue as one entity, it is important that these battles are fought whole-heartedly and without an iota of doubt in the minds of all Indians regarding the righteousness of their cause.

Prime Minister P.V. Narasimha Rao was the most astute Congress politician to have ever dealt with the

Jammu and Kashmir problem in a sincere manner even though his contribution is not acknowledged. He successfully defeated the Pakistan designs in international forums to embarrass India on its human rights record in J&K. Rao built consensus on the state and that is something his successors need to appreciate. His contribution to upholding the Indian official viewpoint on the state should be acknowledged, and without grudges.

In 1994, during his tenure as Prime Minister, Parliament passed a unanimous resolution to take back the Pakistan Occupied Kashmir (POK) declaring it to be the unfinished agenda of Partition. The document is being reproduced hereunder.

> ***Following increasing terrorist violence and Pakistan's attempts to highlight the Kashmir dispute, both Houses of the Indian Parliament unanimously adopted a resolution on February 22, 1994, emphasizing that Jammu and Kashmir was an integral part of India, and that Pakistan must vacate parts of the State under its occupation. The text of the resolution follows:***
>
> "This House notes with deep concern Pakistan's role in imparting training to the terrorists in camps located in Pakistan and Pakistan Occupied Kashmir (POK), the supply of weapons and funds, assistance in infiltration of trained militants, including foreign mercenaries into Jammu and Kashmir with the avowed purpose of creating disorder, disharmony and subversion: reiterates that the militants trained in Pakistan are indulging in murder, loot and other heinous crimes against the people, taking them hostage and creating an atmosphere of terror;
>
> Condemns strongly the continued support and encouragement Pakistan is extending to subversive and

terrorist activities in the Indian state of Jammu and Kashmir;

Calls upon Pakistan to stop forthwith its support to terrorism, which is in violation of the Simla Agreement and the internationally accepted norms of inter-State conduct and is the root cause of tension between the two countries; reiterates that the Indian political and democratic structures and the Constitution provide for firm guarantees for the promotion and protection of human rights of all its citizens; Parliament Resolution on Jammu and Kashmir; regard Pakistan's anti-India campaign of calumny and falsehood as unacceptable and deplorable; notes with deep concern the highly provocative statements emanating from Pakistan; urges Pakistan to refrain from making statements which vitiate the atmosphere and incite public opinion; expresses regret and concern at the pitiable conditions and violations of human rights and denial of democratic freedoms of the people in those areas of the Indian State of Jammu and Kashmir, which are under the illegal occupation of Pakistan;

On behalf of the People of India, firmly declares that –

(a) The State of Jammu and Kashmir has been, is and shall be an integral part of India and any attempts to separate it from the rest of the country will be resisted by all necessary means;

(b) India has the will and capacity to firmly encounter all designs against its unity, sovereignty and territorial integrity; and demands that –

(c) Pakistan must vacate the areas of the Indian State of Jammu and Kashmir, which they have occupied through aggression; and resolves that–

(d) All attempts to interfere in the internal affairs of India will be met resolutely."

It is another matter altogether that nothing substantial has been done to redeem this pledge which was announced by the Parliament two decades back.

Article 370 of the Constitution of India defines the constitutional relationship between India and one of its constituent units, the State of Jammu and Kashmir. There is lot of disinformation and misunderstanding regarding this article among masses and among experts. In the chapters that follow, we will discuss the impact and implications of Article 370.

Overall, what follows is a critical appraisal of Article 370 in the present context, understanding about it among masses and what role it plays in day to day governance issues in Jammu and Kashmir.

For the sake of convenience and reference, the text of Article 370 is given here.

Text of the Article 370 (Without amendments)

Article 370 of the Constitution of India

1. Not withstanding anything in this Constitution:
   a. the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir,
   b. the power of Parliament to make laws for the said State shall be limited to;
      i. those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

ii. such other matters in the said Lists, as, with the concurrence of the Government of the State, the President may by order specify.

Explanation—For the purpose of this article, the Government of the State means the person for the time being recognized by the President as the Maharajah of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

c. the provisions of Article 1 and of this Article shall apply in relation to this State;

d. such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify

i. Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

ii. Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of the Government.

Thus the extraordinary nature of circumstances in which the State of Jammu and Kashmir acceded to India after the Partition of India have been touched upon to lay solid foundations. These pages form the basis of the next chapters in which an attempt has been made to analyze the impact of Article 370 on the ordinary masses of J&K. In fact, the Article does not impact the ordinary masses of J&K alone. It impacts the citizens of India living in the state of J&K many ways and that too has to be understood.

CHAPTER- 2

Understanding among masses and media

THE objective of this chapter is to broadly assess the level of awareness about Article 370 among masses, as also classes, so to say. The idea is to understand whether ordinary Indian masses are aware of the significance of this Article of the Constitution of India. During random discussions with ordinary people, while travelling from Jammu to Srinagar, to Kargil, Leh, and beyond, it was found that a very large number of people talk in terms of broad generalizations and do not understand the implications of this Article.

At other times, these discussions were initiated at canteens in Jammu University, during train journeys from Jammu to Delhi, Delhi to Chennai, Chennai to Mumbai etc, and the broad impressions were not very different. People said they have heard about Article 370 and believe it has "something to do with J&K". Some wondered aloud whether this Article was the root cause of the wanton violence and the secessionist movement now underway in Jammu and Kashmir.

During a journey from Jammu to Indore, in December 2012, a group of former soldiers boarded the train from Jalandhar after participating in a reunion function. They discussed animatedly how bravely they had fought during Kargil war in 1999. They recalled

some friends who lost their lives during that war and said no sacrifice is too high to keep Jammu and Kashmir with India. They had no doubt that it was the right course. They also said how they wished there were peace on the borders with Pakistan because that will mean far more easier life, and also a more prosperous life, for people on both sides.

When asked what they knew about Article 370, these soldiers, some hailing from Gwalior, Guna, Bina and a couple of other places in Madhya Pradesh, replied that this was something about which, may be, officers were given some capsule courses, once upon a time. Since they had all retired now, they were not clear about the practices prevalent in the units getting inducted in Jammu and Kashmir now.

As soldiers, with just adequate education, understanding nuances and finer points of the Constitution was beyond them, they were candid in admitting this.

For the sake of taking things further, similar questions were put to educated persons coming from different backgrounds. They were requested to pen down their thoughts on Article 370 in an impromptu manner. Out of over two dozen people who were requested only four wrote back, sending emails on their impressions and understanding about Article 370.

The articles, or impromptu write-ups, these people sent have been included in this chapter.

For a couple of months, an attempt was made to see whether any articles about Article 370 were appearing in local press in Jammu and Kashmir. Very few, if any, articles on the subject now get carried in the media, both local and national. There were some

articles mentioning Article 370 which appeared in GREATER KASHMIR[1], which is a largely circulated newspaper, published from Jammu and Srinagar cities.

Some of these articles written by social scientist are also being included to understand rules of society.

Social scientist's views on Article 370

State remains 'unfree'

By Professor Dipankar Sengupta,[2]
Head of Department,
Department of Economics, University of Jammu

Article 370 of the Indian Constitution to me is a valve that enables the polity of the State of Jammu and Kashmir to decide what provisions of the Constitution of India is applicable to the State and what is not. The manner in which the State's polity has operated has ensured that certainly after the nineties, Article 370 ensures the State's autonomy while paradoxically ensuring that the residents of the State remain "unfree". The nineties has been described by Gurcharan Das as the liberating decade where India is concerned because of economic liberalization (that curtailed State Power in economic decision-making) and Democratic Decentralization that finally gave communities and localities the right to govern themselves.

The latter process has been formalized by the 73rd and 74th Amendments to the Indian Constitution. These developments that empower local communities and confer potentially a great degree of freedom to them is not guaranteed to communities and localities in Jammu and Kashmir *vide* Article 370 which ensures that these Amendments are not automatically applicable to the State. In the same vein, the Forest Act 2006 that empowers marginalized communities living in India's forests is not applicable to Jammu and Kashmir because of Article 370.

Indeed, the State Government in the face of an adverse High Court Judgment vis-à-vis its practice of taking away the status of permanent residence from women of Jammu and Kashmir who married non-permanent residents which was declared illegal, actually tried to legislate this practice into law. Such a law, if enacted, would have been grossly violative of the fundamental rights guaranteed to citizens of India (and *vide* the State's own constitution to permanent resident of Jammu and Kashmir as well.)

Thus, Article 370 clearly brings out the conflict in Jammu and Kashmir where autonomy conflicts with fundamental rights, empowerment of the various communities in the state, their participation in governance and decision making rendering the residents of the State "unfree".

What is special status under Article 370? Hindrances in achieving 'independence'

Dineshwar Jamwal[3]
A. Social Worker, Convener, Universal Foundation, NGO (Regd.)

Some people think that Article 370 of the Constitution of India gives constitutionally a special status to J&K state, some say that Article 370 is a conspiracy against people of Jammu and Kashmir as it is doing more harm than good to them. Some challenge that anyone who opposes or challenges the Article 370 of the Constitution is against the Special status to Jammu and Kashmir state which has been given to it by the provisions of this Article, some code it as a safeguard of the Indian Constitution which grants special status to J&K State and some say that it is a special status article by which the Indian federal system has the maximum advancement and by the application of which the "federations rise in response to definite set of stimuli".

Jammu and Kashmir being a constituent State of the Indian Union, as it is included in the list of the States of the

First Schedule of the Constitution of India. This is the only State in the Indian Union with Muslims in majority. The State of Jammu & Kashmir was acceded to the Dominion of India by Maharaja Hari Singh, on 26th October 1947.

During the partition of India into two Dominions, communal disturbances and hunger for power in the sub-continent were the provocations in order to fulfill the long awaited desires to assume political supremacy, and the division of the sub-continent based on the religion was creating hindrances in achieving the very objective of "Independence".

Owing to the internal conditions of J&K State, Maharaja Hari Singh himself was in a dilemma and, therefore, he was not in position to take an early decision with regard to accession of the state with either of the Dominion-India or Pakistan, so he offered to sign a Stand Still Agreement with both the dominions.

Even after signing the Stand Still Agreement with Pakistan, (as India had rejected this offer), the invaders from areas in Pakistan had spread havoc among the innocent and unarmed people of the State. The state of Jammu & Kashmir was in a helpless condition as the life and the honour of the people was at stake. Therefore, a state of great emergency existed in the State, which perhaps prompted the Maharaja to appeal to India for urgent help, and later on, may be under pressure of the circumstances, the state acceded to the Dominion of India.

At the same time, it is also pertinent to mention that, if the public opinion in the J&K State had been strong in favour of accession to the Dominion of Pakistan, the invaders would have certainly been welcome and would have been extended full co-operation to realise the very object. Instead, the people of the State reacted against the invasion and retaliated at the cost of their lives.

As the State of Jammu and Kashmir was passing through a phase of grave crisis at the time of partition; it

was necessary that the administration of the state be geared to these unusual conditions until normal life was restored. That is why, the framers of the Indian Constitution, made some provisions with respect to the state of Jammu and Kashmir to meet the unique situation, and Article 370 was incorporated 'temporarily' into the Indian Constitution for meeting procedural needs, which has been exploited by the people to whom it suits politically till date.

Whether it is a special status which was given to J&K State, is not true, as have also been accepted by the Interlocutors appointed for J&K in their final report (October 2011) that Article 370 of Indian Constitution is not a special status Article.

The Constitution of India did place J&K state on a different footing than the other princely states that acceded to the Indian Union because of Article 370 and it cannot be named as special status Article legally or even to look at J&K differently than the other States that form part of India.

People of Jammu & Kashmir have been suffering from uncertainties since 1947 as they have been the victims of personal ambitions of a few mainstream political leaders/parties, which have even gone to the extent of describing Article 370 of Indian Constitution as a sign of conditional or limited accession.

I personally believe that Article 370 is absolutely unfair to the fairer sex which constitutes almost 50% of the total population of the State. The female state subjects become victims of harmful provisions if they choose to marry outside the state. The male state subjects of the state suffer no such disability.

The affairs of Jammu & Kashmir have not been addressed at political, constitutional and executive levels seriously by a section of the people who mattered. In contrast, anti-India elements have made use of propaganda in a devious manner, making use of Article 370 in a manner

in which it was not intended by the founding fathers of this nation.

Wrong interpretation of Article 370
This Article is meant to be abrogated

By Mahesh Kaul,[4]
Research Scholar, School for Management Studies, Jammu University

There is no doubt about the fact that the Article 370 becomes the centre of a raging debate every now and then. And the worst thing is that it is often interpreted in a wrong manner as if this article is the cardinal principle of the constitutional and political status of the state in the Union of India. The analysis on Article 370 has been more on rhetoric and less on the nature of the Article.

It was a temporary article and hence the so-called special status it conferred on the state was also clearly of a temporary nature. It was never meant to as is being understood to grant special status to the state. Its very nature was that of change. It is pertinent to underline the provisions incorporated in the Article 370 that empowered the President of India to:

1. Transfer powers to the Union in regard to such other subjects in the Union List and the concurrent list of the 7th Schedule of the Indian Constitution, which the President specified with the concurrence of the State Government.

2. Extend to the state the provisions of the Constitution of India, which were saved application to the State with such modifications and expectations as the President would specify.

It becomes amply clear that there is nothing in the above mentioned points that makes this Article sacrosanct, beyond change or alteration. Interesting thing is that the provisions to amend the Article 370 were incorporated in

the Indian Constitution with the powers of amending the Indian Constitution being vested with the Parliament. On studying the Article 370 carefully, it becomes clear that there are no limitations in terms of amending it. Thus, technically speaking, there is no hurdle to abrogate the Article if Parliamentarians collectively choose to do so.

This article insulates J&K from the national mainstream. The wrong interpretation of this article leads to a falsification of the constitutional reality. This canard that this Article is meant to keep the state away from the national mainstream has helped to fan the separatist tendencies. Those subscribing to this interpretation argue that the so-called special status was given to the state to maintain its Muslim-majority character. This in itself is a deviation from the true meaning of this temporary Article, which was supposed to have been erased from the Constitution as its abrogation in very much inherent in its being.

The wrong interpretation of this Article has created many fault-lines that are now staring the Indian nation, which should not have been the case. It is a strange case in the constitutional history of the Indian nation that a very weak Article has been given teeth by the out of the context connotations that is now posing the challenge to secular nation building in the state of J&K.

The separatist formations and the so called mainstream parties based in the Kashmir valley are using this article as the tool to propagate their communal agenda and subjecting the minorities to the servitude of their communal politics. The result has been the demographic change in entire state with the internal displacement of the religious minorities and the consolidation of the majoritarian communal pockets.

It is a paradox that the Article is being used against the sense and spirit of the secular Indian Constitution and fans

separatist tendencies to turn the state a Muslim sphere of influence.

The detractors of the Indian nation argue that the Article 370 was meant to address the "wrong" of the accession. They argue that as the state was a Muslim majority state, so its separate identity had to be maintained within the Indian set-up. It is again the diversion from the constitutional reality that shaped the two states of India and Pakistan. It was the British India that was to be partitioned and the princely states were not the part of the partition plan. For the princely states, there were only two options of accession, either with India or Pakistan and there was no third option of independence or the so called separate identity. Above all, the sovereignty lied with the ruler and not the subjects of any princely state.

To project the Article 370 as the instrument of achieving or conceiving separatism is a perversion. Constitutional experts and political scientists have an added responsibility of interpreting this temporary Article in the right perspective. They should interpret it is a manner and sense in which it was framed and discuss the mechanism of abrogation as well threadbare. As it was meant to be abrogated, being temporary, this is the only thing special about the article. Nowhere in it lies the case for the special status of the state of J&K.

The policy makers have to realize that the faster this act is abrogated, the better it is for the secular nation-building.

To scrap or not to scrap Article 370

By Ranjan Chauhan[5]
Social Worker

The debate over scrapping or not scrapping Article 370 has been raging since the incorporation of Jammu and

Kashmir into independent India. Before going into the details, we need to understand the relevance of Article 370.

Is it that the Article 370 has been incorporated in our Constitution to grant some special status and privileges to J&K? It conferred a right on the state to frame a Constitution for itself and restricted the power of Parliament to frame laws for J&K. The Article specifies that except for Defence, Foreign Affairs, Finance and Communications, (matters specified in the instrument of accession) the Indian Parliament needs the State Government's concurrence for applying all other laws. Thus, the state's residents live under a separate set of laws, including those related to citizenship, ownership of property, and fundamental rights, as compared to other Indians.

The very purpose of Article 370, namely, to give more space to Kashmiri sentiments, however, fanned separatism. Also, due to Article 370, several Indian laws are not applicable to J&K. This only acts as beacon for separatists in other parts of India and also at the international level.

The vested interests that defend status quo with regard to Article 370 only harm the state as also India. This mentality has bred regressive policies in the state, and left them backward.

It is indeed imperative now that the political establishment of India understands the vital importance of scrapping Article 370 and stops feeding political thugs in J&K.

Article 370 in newspaper reports

In the following few pages, we have included some reports and articles appearing in the widely circulated newspaper, Greater Kashmir, in which a mention has been made of Article 370. These reports and articles, have relevance of to the purpose of our study. In the first of these reports (published on December 16, 2012), the National

Conference (NC) MP Mehboob Beg opposes permanent settlement of West Pakistan refugees in the State of Jammu and Kashmir.

Dr Mehboob Beg, who did his MBBS from Indore Medical College, is candid in saying that settlement of these Hindus and Sikhs in J&K will dilute the Muslim-majority character of J&K. This is the basic reason why these people should not be allowed to settle in the state and enjoy wider citizenship rights. He also says that these people are the responsibility of the government of India (Central government) and the Centre will do well to take out these people from J&K and settle them in any other part of India.

What does he mean by permanent settlement of the West Pakistan refugees? These people have been living in the State of Jammu and Kashmir since 1947. Are these people not entitled to enjoy citizenship rights despite staying in these locations for the last 66 years? Three to four generations of these people have been born and brought up there in these 66 years.

This also brings us to the question of domicile, permanent domicile, naturalisation process and other related issues. However, it is not possible to discuss these things in the present study. This also raises questions about federalism, asymmetrical federalism etc. While all citizens of Jammu and Kashmir are citizens of India. However, all citizens of India cannot be citizens of J&K. This is a paradoxical situation whereby due to peculiarities of the existing laws, a citizen of J&K can settle anywhere in India, can get education anywhere in India but a citizen of India cannot enjoy any of these facilities in J&K. This is a one-way street where the gains are reserved for the citizens of J&K in India and no Indian citizen can gain from the state largesse in J&K.

A couple of other articles and reports, also taken from Greater Kashmir, give us broadly the thinking of a section

of the people in Jammu and Kashmir towards Article 370 and the Indian nation.

Dr Beg opposes State Subject status to refugees

'GoI Can Rehabilitate Them in Any Part of Country'

GK NEWS NETWORK

New Delhi, Dec 15: Senior National Conference (NC) leader and Member Parliament, Dr Mehboob Beg, Saturday told Lok Sabha that Government of India can rehabilitate West Pakistan refugees in any part of India but not in J&K.

Opposing granting these refugees, presently living in Jammu, State Subject rights in J&K Beg said: "Indian citizenship does not confer the title of State Subject on an individual. Maharaja Hari Singh granted the State Subject status to the residents of J&K on the demand of Kashmiri Pandits. Now this has to be preserved and saved to preserve the Muslim majority status of the State and its uniqueness and special identity." Dr Beg was speaking on the private member's resolution: "Persons migrated from Pakistan to India and settled in various parts of the country: this House urges upon the Government to take steps to grant them citizenship and formulate action plan to extend them facilities as are available to other citizens of the country." Beg was interrupted by some BJP leaders saying, "You have made Kashmiri Pandits refugees in their own homeland."

To this, Beg replied, "While we are proud of having preserved communal harmony even during 1947 communal riots which engulfed the entire country, we cannot hold our heads high unless we get our Pandit community back to their homes."

Dr. Beg said rather than granting the West Pakistan refugees Indian citizenship, the GoI should take up this issue in the UN and other international fora and make sure that all minorities are safe in their own countries. He further stressed that India on its part should not allow 'sad

happenings like the one which happened in Gujarat' in 2002. Mehboob Beg said that had Ali Muhammad Jinnah lived longer, he would have certainly created a secular-democratic Pakistan.

During his speech, Mehboob Beg quoted Jinnah's historic speech which he made after creating Pakistan: "From today onwards you cease to be a Muslim, a Hindu, a Sikh or a Christian, not in the sense that you will stop going to mosques, temples and churches but in the sense that you are all Pakistanis."[6]

PRC issue puts Govt in tight spot

West Pakistan refugees are not JK residents: Sagar

ARVIND SHARMA

Jammu, Jan 7, The issue of granting Permanent Resident Certificates (PRC) to West Pakistan refugees is set to snowball into a major political controversy besides bringing coalition partners Congress and National Conference (NC) head-on, as the government Monday made it clear that it has no plans to bring any constitutional amendment in this regard as the West Pakistan refugees are not residents of Jammu and Kashmir.

Rebuffing its coalition partner Congress on granting Permanent Resident Certificates (PRC) to West Pakistan refugees, Minister for Law and Parliamentary Affairs Ali Muhammad Sagar Monday said; "Anybody was free to bring a Bill in the legislature in this regard, but the government has no plans to do it on its own." "As far as amendment is concerned, anyone can bring the Bill," Sagar said but hastened to add, "where is the two thirds majority that is required to amend the constitution?" "West Pakistan refugees are not the residents of Jammu and Kashmir and as such there is no question of giving them PRCs", Sagar said, when his attention was drawn to the statement of a Congress minister in this regard.

"Granting PRCs to West Pakistan refugees doesn't come under the ambit of the Constitution of Jammu and Kashmir as they are not the residents of our state', Sagar added. He also said that it is an issue which comes under the purview of Government of India and therefore, the onus lies with the Central government to settle the issue. However, he added that the Chief Minister had already expressed his concern about the problems being faced by the West Pakistan refuges ever since they had been displaced. "In this regard CM has already requested the Government of India to settle the issue", he said.

Pertinently, two senior Congress leaders and ministers in the Omar Abdullah-led coalition government, Sham Lal Sharma and Raman Bhalla, while addressing a public meeting near Vijaypur here Sunday announced that the state government will bring an amendment in the constitution during the upcoming session of the state legislature to grant PRCs to the West Pakistan refugees.

They had also stated that the matter is under the active consideration of the state government. "The State government will bring necessary amendment in the Constitution in the next Assembly Session to clear all hurdles related to this issue. The domicile certificate is an internal matter which would be sorted out shortly," Bhalla, flanked by Sharma, said. He said State Congress Chief, Prof Saifuddin Soz, is personally monitoring the progress of the outcome of discussion with the Central leadership which recently took place at Delhi.

Sharma, while addressing the refugees, said that a delegation of state leaders under the leadership of President Pradesh Congress Committee, Prof Saif-ud-Din Soz and MP Madan Lal Sharma met the Central leadership recently and discussed the issues of West Pakistani and PoK refugees.

The issue was also raised in the Lok Sabha some days back by Member Parliament, Lal Singh quite vociferously

wherein, he also strongly advocated for granting of PRCs to West Pakistan refugees.[7]

'No compromise'

Congress Says NC Has To Fall In Line

PERMANENT RESIDENT CERTIFICATE ROW

ARVIND SHARMA

Jammu, Jan 10: After a tug-of-war over implementation of 73rd constitutional amendments in Jammu and Kashmir, Congress has now put a defiant face against its coalition alliance National Conference over grant of Permanent Resident Certificates (PRCs) to the West Pakistan refugees in the State.

Informed sources told Greater Kashmir that Congress is ready to "fight another battle" with National Conference leadership over the PRC issue. "We have made it clear to NC that the issue has to be resolved and refugees have to be given state subject status well before the next general election," a senior Congress leader, wishing anonymity, said. He said the NC leadership will have to "fall in line like it did over the issue of amending the Panchayati Raj Act."

Pertinently Congress is raising the issue as a "human problem", claiming that refugees have suffered a lot during the last several decades since they had been displaced from their native places. "It is a multi-dimensional and ticklish matter and above all a human problem," Congress leaders said, adding, "Unfortunately the matter has also not been examined in depth by successive governments in the State for decades together." Pradesh Congress Committee (PCC) president Prof Saifuddin Soz said the Congress state unit and the union government is optimistic over the issue. "The matter has already been taken up with the Government of India which has given a very positive response in respect of

granting PRCs to refugees," Soz told Greater Kashmir over phone from New Delhi.

He said, "I have discussed the matter with Sonia Gandhi, Prime Minister Manmohan Singh and the Home Minister. They all have given a very positive response."

He, however, said that for its amicable resolution, the issue will also be discussed in the Coalition Coordination Committee meeting soon. "I am confidant and have no doubt that this problem will be resolved amicably without any tension," he asserted. "Both central as well as state government will have to be on board for resolving the issue."

Pertinently, the Revenue, Relief and Rehabilitation Minister, Raman Bhalla and Health Minister, Sham Lal Sharma recently said the state government will bring an amendment in the upcoming assembly session for granting PRCs to West Pakistan refugees. The public announcement did not auger well with the coalition partner NC which said the West Pakistan refugees are not the residents of Jammu and Kashmir and therefore there is no question of granting PRCs to them.

The NC had also made it emphatically clear that the government on its behalf has no intentions of bringing any such amendment which has "every potential of diluting the special status which the state enjoys with Article 370 of the Indian Constitution."[8]

Dr. Mirza Ashraf Beg has very deeply analysed the pain of being homeless in his article

The pain of being homeless
Of West Pakistan Refugees And Kashmir Issue
DR. MIRZA ASHRAF BEG

Since the painful exit of Adam from the heavens the greatest desire of the mankind has been to make a home of its own. Despite this there are homeless all over the world

including the most developed countries like US. As there are man-made boundaries these tragedies need be addressed on the basis of logic and wisdom for a long term solution. If we don't follow rules and regulations there is bound to be chaos and anarchy in the world.

These days there is a lot of hue and cry regarding the settlement of the refugees from West Pakistan in J&K? Before expecting a way out we need to go into the historical background of these unfortunate people and the partition of India resulting in the continuation of special status of J&K and Article 370 of Indian constitution. Going a bit deeper, despite some manipulations in the past, J&K constitution and the Indian constitution are hinged together on certain defined principles.

The more you tamper with these set rules, the more we lead into complications regarding relations between J&K and union of India. Having said that, Article 370 of J&K constitution has its origin in the feudal system of Dogra rule hence is more mature than Indian constitution itself. That way the said article safeguards the interests of the state subjects of J&K irrespective of their cast creed or ethnicity. Hence it is incumbent on the state subjects to safeguard their interests irrespective of the fact weather they are from Ladakh or Jammu or they hail from the Muslim majority valley of Kashmir. At the same time, nobody has a right to oppose the entry of displaced refugees of West Pakistan on the basis of their cast or creed or their ethnicity.

The point of discussion is just application of Article 370 of Indian constitution and its relationship with the constitution of J&K. Just to refresh here the two constitutions agree on protecting the rights of state subjects and gives guarantees that a non-state subject can in no case acquire the state subject status whatever. Hence political parties having different approaches to a common problem need to do some homework lest they come to a deadlock.

India is a large country with huge resources and a great foresight. It may not be difficult to rehabilitate these unfortunate victims of the partition at any other feasible site based on their origin of area of displacement. We need to remember that we have constructed housing colonies for displaced Kashmiri Pundits either in the valley of Kashmir or in Jammu based on their status of state subject. Nobody asked for their rehabilitation in other states of India and that was not a sensible solution at all. It will be very unfortunate to communalize the issues of human sufferings and connecting everything to the two nation theory of partition. Let us not behave as robots with a mindset?

It is also being argued that these refugees from West Pakistan be given property rights on the properties of the displaced state subjects that migrated to the other side of cease fire line in 1947. Here again, we need to refresh our knowledge regarding international law at a time when Kashmir issue is still pending in United Nations that guaranties your rights on property and other related issues. That is why pending final settlement of J&K the state government in 1947 handed over these properties to the evacuee department of custodians with the result nobody can sell or buy these properties till date. We need to understand that we can give only what we have! We also need to remember that the state of J&K was not divided on the principal of two nation theory the way India got divided in 1947. The division of the state was the result of tribal invasion leading to UN intervention and a ceasefire between India and Pakistan. That is why we have a line of control separating the two parts of the state and a final settlement of J&K is awaited.

There is a genuine point that these refugees are practically homeless for over sixtyfive years and we have to consider their rehabilitation. This also is a fact that since elections are round the corner political organizations have their agendas to hoodwink these gullible. It is incumbent on

government of India to rehabilitate these homeless somewhere in India where they have legal rights for their future generations and not just a green-card to live in the green pastures of J&K.

(The columnist is the writer of the book, 'Kashmir in search of peace')

From this analysis, we find that the understanding among ordinary masses about Article 370 is widely divergent. It will not be inappropriate to recall the story of the elephant and the seven blind men who were asked to define elephant. The seven blind men defined the elephant in altogether different manner because each one of them groped, in the dark, only one part of the elephant. The one who held its trunk defined it differently from the one who laid his hands on one ear of the elephant.

One needs to take the limitation of the seven blind persons into the account and say that all seven of them were describing elephant correctly, even when each description was entirely different from the other narrative.

Article 370 is indeed like the elephant being described by the seven blind men. There are several competing and contradictory narratives about it and the less than adequate dispassionate and objective coverage of the issue in the media means misconceptions are too many.

This can and needs to be corrected and the contrary views reconciled by devising an effective communication strategy about Article 370. When implemented, this will help enhance understanding among the masses about it.

In an attempt to understand how well, or how little, or how correctly or otherwise, people understand Article 370, a simple questionnaire was devised and distributed. The questionnaire had 10 basic questions pertaining to Article 370.

The very first question of the questionnaire asked whether Article 370 is a part of the Constitution of (i) India

(ii) Jammu and Kashmir (iii) Nagaland or (iv) Don't know. A number of respondents answered it wrongly saying it is a part of the Constitution of (ii) Jammu and Kashmir, instead of saying that it is a part of the Constitution of India.

The second question pertained to the title of the Article 370 and the title says that it is "temporary". However, a large number of respondents said that it is "permanent". An equally large number of respondents also said that it is "special". On a lighter note, one of the answer choices that the respondents could have been given was perhaps (v) permanently temporary.

An overwhelming majority of respondents did not know who had drafted Article 370 (question 5) nor did they know that it was introduced as Article 306-A in the Constituent Assembly (question 6).

A vast majority also did not know the significance of the First Constitutional Application Order (C.A.O.) and that it was issued by the President in the year 1950.

Overall, it can be said that though there is heated discussions in the public domain on Article 370, this is not necessarily because the people know the Article so well that they can argue, for and against, it. This happens mainly because people tend to take sides without understanding the issue at stake!

Given this, it is vital that an effective communication strategy is evolved to educate the masses about Article 370. This is easier said than done because there are so many wrong notions that prevail about this Article among ordinary people. It will indeed be a Herculean task to educate them about the Article, and sooner the better.

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CHAPTER -3

Discrimination against women

DO the women of Jammu and Kashmir enjoy the same rights as the men? This may well look like an odd question since the Constitution of India guarantees equality of genders. In fact, it expressly prohibits any discrimination on the basis of gender, caste or creed, and terms such discrimination as repugnant and regressive, not to be condoned in the society. Across the nation, there are campaigns now going for the empowerment of women. And the women are making rapid strides in all spheres of life. Is this also true of Jammu and Kashmir? This question is relevant in the context of peculiar citizenship laws prevailing in J&K due to a certain interpretation of Article 370.

This chapter is specifically devoted to analyse the reality of the impact of Article 370 on the women living in Jammu and Kashmir. Does Article 370 help the women, who constitute about half of the state population or does it harm them? Are the women of J&K better placed or worse as compared to the women in other parts of India? In the following pages, we will find some answers to these questions. The state government treats women differently from men and has so far managed to get away with it. The women of J&K do not have the same rights as men have when it comes to citizenship rights for spouses and their

children as well. There are some laws which successive state governments in J&K have followed and these laws clearly violate the principle of gender equality enshrined in the Indian Constitution. Incidentally, it bears mention here that gender equality, meaning equal rights for both men and women with no discrimination against women, is an established norm throughout civilized world and civilized societies.

It is only in some backward and regressive societies that women are still treated as second class citizens and don't enjoy rights similar, rather equal, to men. In fact, giving more and more rights to women so that they can measure up to men in all spheres of life has been the endeavour of civilized societies throughout the world.

Not so in Jammu and Kashmir. Here men and women marrying outside the state are treated differently. The men of Jammu and Kashmir who marry outside can bring home their wives. These women then become State Subjects as they get permanent resident certificates (PRCs). The men from J&K can marry any women of their choice, from any part of the world, be it Pakistan, the UK, the USA or China. These women will acquire citizenship of the state gaining from marrying State Subject men. The children born to these women will also get the citizenship rights in Jammu and Kashmir without any hassles. They can then enrolled in any schools or colleges funded by the state government. These children will also have all the rights to get admissions into professional colleges set up by the state government.

In contrast, women from the state marrying outsiders cannot bring home their husbands, even if the circumstances may so demand. The men from other states marrying State Subject women cannot get the citizenship of the state even if they want to. The women of the state marrying outsiders face distinct disadvantages. Some courageous and resourceful women who married outsiders fought these discriminatory laws and practices promoted by the state government. However, they still have a long way to go even if they have got some respite and recognition. However, the relief or respite they have been able to get from the courts is miniscule, negligible or at best perfunctory and less than useful.

For explaining this point further, substantial elaboration will be needed, it follows.

Rights in Peril

Till some years ago, the women marrying outsiders found that their citizenship rights were extinguished. The moment they married an outsider, they would cease to be State Subjects[1]. This led to a situation where women serving in government employment found that their services were terminated. This did not happen to all women employees marrying outsiders because in a large number of cases, the women themselves did not disclose this fact to anybody, officially. The women serving in state service also faced another problem when they applied for some professional course. They found that they were treated as outsiders and were no longer eligible for these courses open to in-service candidates.

This happened to a large number of women doctors from the state who married outsiders after doing their MBBS and even joined government service. When they wanted to pursue higher studies and wanted to acquire MD or MS qualification in their chosen fields, their applications were rejected on the ground that they were not eligible since they were no longer State Subjects[2]. The women of Jammu and Kashmir marrying outsiders found that they could not improve their qualifications even if they were meritorious and wanted to continue working in the state employment. In many cases, their services were terminated on the ground that they were no longer eligible for state employment after marrying outsiders[3].

Many of these women filed cases in different courts but it was a long and cumbersome process for most of them, with little respite or relief readily offered by the courts. Several women from the State, who married outsiders, then decided to approach the Jammu and Kashmir High Court. It so happened that by the year 1977, no less than 30 years after Jammu and Kashmir acceded to India, several such cases were clubbed and hearing started.

J&K High Court Verdict

The case, titled 1. **State of J&K versus Dr Susheela Sawhney (LPA 29/1979)**[4], wherein several LPAs, OWPs and SWPs were clubbed, went on, and on and on, till October 2002, when a verdict was announced by a three-judge Division Bench of Jammu and Kashmir High Court.

The other cases, on the petitioner side, were titled 2. Dr Ravinder Madaan Vs State of Jammu and Kasahmir 3. Anjali Khosla Vs State of Jammu and Kashmir 4. Sunita Sharma Vs State of J&K 5. Dr Abha Jain Vs State of J&K 6. Dr Shabnam Taj Vs State of J&K 7. Kamla Rani Vs State of J&K 8. Ranju Modi Vs State of J&K 9. Harjeet Singh Vs Amarjeet Kaur 10. Shruti Vs State of J&K 11. Dr Rubeena Nasrullah Vs State of J&K 12. Dr Reeta Gupta Vs State of J&K.

The LPAs, OWPs and SWPs clubbed with the case were: LPA 24/1979, OWP 171/86, OWP, 1111/85, OWP 166/85, SWP 52/1997, OWP 152/1985, OWP 520/1994, OWP 857/2001. C. Rev 127/80 and SWP 650/2001.

The three judges on the Bench were Acting Chief Justice Vijay Kumar Jhanji, Justice T S Doabia and Justice Muzaffar Jan. On October 7, 2002, the Bench headed by Justice Jhanji announced that the ***"daughter of a permanent resident of the State of Jammu and Kashmir will not lose status as a permanent resident of the State of Jammu and Kashmir on her marriage with a person, who is not a permanent resident of the State of Jammu and Kashmir[5]".***

This view was endorsed by Justice T S Doabia who concurred with the opinion expressed by Mr Justice Jhanji.

The third judge, Justice Muzaffar Jan, however, differed from the opinion expressed by the other judges and said: ***"I do not agree to the ultimate conclusion that a female will not lose the status as a permanent resident on her marriage with a non-permanent resident of the State[6]."***

Incidentally, the reference before the Full Bench was "**Whether the daughter of a permanent resident of the State of Jammu and Kashmir marrying a non-permanent resident loses her status as a permanent resident of the State of Jammu and Kashmir, to hold, inherit and acquire immovable property.**"

(In the 94-page judgment, Justice Jhanji's opinion is contained in the first 45 pages, that of Justice Doabia in pages 46 to 69 and that of Justice Muzaffar Jan in pages 70 to 93.)

This question came before the court because till then, the prevalent practice was to extinguish all rights of the women marrying outsiders. The loss or absence of status as a permanent resident of the State of Jammu and Kashmir dis-entitled a person in respect of employment in the State and the right to scholarship and such other forms of aid as were provided by the State Government.

In fact, the State Subject certificates issued to young girls before this verdict had a rather obnoxious condition stamped on them: ***Valid Till Marriage.***

The State Subject or Permanent Resident Certificates (PRCs) issued to young boys, on the other hand, did not have any such stamp. A woman named Anjali Khosla[7] filed a case in the high court challenging the condition imposed on her State Subject: Valid Till Marriage. Her contention was that this condition was "***illegal and un-warranted***[8]". She argued that this entry made on her permanent resident certificate (PRC) was violative of her fundamental

rights guaranteed under the Constitution of India and discriminatory on the basis of sex.

Interestingly, there is no provision in the Notification I-L, dated April 20, 1927, or in the Constitution of Jammu and Kashmir that on marriage with a non-permanent resident, the daughter of a permanent resident will lose her status as a permanent resident of the State.

The Notification referred to here was issued during Maharaja Hari Singh's reign and defines State Subjects of Jammu and Kashmir. But there is no disabling provision in this notification against the women that they will lose their State Subject status if they marry outsiders. Yet, in the absence of any such law in the Constitution of Jammu and Kashmir, the common practice was to disentitle women of the State marrying outsiders and extinguishing their State Subject status.

The verdict of the three-judge Bench delivered on October 7, 2002[9], created a situation where the Jammu and Kashmir government officials had to accept that they could not extinguish the PRC of women after their marriages to outsiders. The case was then taken to the Supreme Court by the state government but later withdrawn before any verdict was given.

Bias against Women

In the year 2004, Mufti Mohammed Sayeed, as Chief Minister leading a coalition government in the State, tried to enact a new law in the State Legislature. The new law was dubbed as anti-women because it said that the women of the State marrying outsiders will lose their State Subject status.

On March 5, 2004, this law was passed in the State Legislative Assembly and was then moved for passage in the Legislative Council. All hell broke loose in several areas of the Jammu province and sporadic protests disrupted normal life. The Legislative Council debated the issue for several days and on March 11, the House was adjourned by then Chairman Abdul Rashid Dar sine die, around midnight, amid chaos. The Bill, called Women's Disqualification Bill, in common parlance, then lapsed.

Years later, however, women of the state marrying outsiders still suffer from disabilities though similar disabilities do not apply to men of the State marrying outsiders. The women of the State marrying outsiders can now continue to be State Subject after their marriage but they cannot acquire any new property in the State. Their children also cannot become the State Subjects and cannot get admissions to professional colleges.

This militates and tramples upon the equal rights guaranteed to the women under Constitution of India. Such a situation is particularly traumatic and extraordinarily painful for women marrying outsiders who either get widowed or divorced. There are several such women in J&K today who married outsiders and returned back to the State either because they got (i) divorced or got (ii) widowed as their husbands died.

By force of circumstances, these women had to come back to the State, in rather unhappy circumstances, along with the children born to them. The children of these women are not eligible for admissions into professional colleges of the State nor can they can get any scholarships etc. In fact, these

children have become virtually stateless (in the context of J&K) since they had to leave the area of their paternal domicile but could not ever become citizens of Jammu and Kashmir.

The treatment that continues to be meted out to the hapless women of the State of Jammu and Kashmir in the name of special status guaranteed to it under Article 370 is absolutely inhuman, unconstitutional and discriminatory. This continues unhindered and unimpeded by any law of the land, because perhaps nobody has approached the Supreme Court citing specific instances of such wrong-doings.

It bears mention here that this discriminatory law and its application impacts far more Hindus than Muslims that inhabit J&K. The reason for it impacting more Hindus and far fewer Muslims is the practices of the two communities regarding marriage. Among Muslims in J&K, a vast majority of marriages happen between cousins; sons and daughters of maternal and paternal uncles and aunts being the first choice as suitors; more so as they have equivalent or compatible social and economic status.

This leads to a situation where very few, if any, girls from the Muslim community get married to boys from outside the state. Several Muslim girls from the state, after getting married to outsiders, also became victims of these discriminatory provisions. Some of them then chose to challenge the treatment meted out to them in the Jammu and Kashmir High Court on the basis of these practices being violative of their fundamental rights guaranteed under the Constitution of India and discriminatory on the basis of gender.

In OWP No 152/1985, Dr Rubina Nasarullah vs State[10], one of the cases clubbed with Dr Susheela Sawhney case, the petitioner challenged the action of the State whereby she was deprived of her right to pursue her education in the State on the ground that she had married a non-permanent resident (outsider) of the State. Dr Rubina is the daughter of Mir Nasarullah, who served the state as Chief Secretary. She is also the grand-daughter of late Ghulam Mohd Sadiq, who succeeded Bakshi Ghulam Mohammed as Chief Minister of the State. Incidentally, Rubina married Ranjeet Malhotra, son of Surinder Nath Malhotra, an IPS officer who served in Jammu and Kashmir. Incidentally, Surinder Nath Malhotra died in an air crash while serving as the Governor of Punjab. She was denied admission in post-graduate course in a medical college in the State on the ground that she had married an outsider.

In OWP No 52/97, Shabnam Taj versus State of Jammu and Kashmir[11], another case clubbed with Dr Susheela Sawhney case, petitioner Shabnam Taj challenged the action of the Public Service Commission (PSC) in refusing to entertain her application for the post of assistant surgeon (entry level post for MBBS doctors), on the ground that she had failed to produce Permanent Resident Certificate, "after marriage". The certificate of PRC issued to her contained a condition ***Valid Till Marriage.***[12]". Her parents and forefathers have been State Subjects for the past several decades. In fact, her father, Taj Mohiuddin, is a cabinet minister in Omar Abdullah government (since January 5, 2009) at the time of the finalisation of this monograph. Earlier too, Mr

Mohiuddin was a cabinet minister from November 2002 to July 2008.

Stark Realities

These two cases clearly illustrate the fact of gender discrimination in the State of Jammu and Kashmir, contrary to the fundamental rights enshrined in the Constitution of India. The male State Subjects were issued a Permanent Resident Certificate (PRC) without any condition of "valid till marriage[13]". In contrast, the female State Subjects were issued a Permanent Resident Certificate (PRC) with the condition "Valid Till Marriage[14]". The females have to get a second PRC made after marriage.

After marriage, a female would be issued a PRC from the tehsil and district to which her husband belonged. Her citizenship would thus be contingent upon the citizenship and domicile of her husband. These disabling provisions are undoubtedly discriminatory on the basis of gender and run contrary to the provisions of the Indian Constitution.

Incidentally, the PRC provisions impact the Jammu region more than the people of Kashmir province. This happens mainly because many areas of the Jammu region are contiguous to Punjab and Himachal Pradesh. In these areas, the languages spoken, culture and other social systems are not very different from one another. This often leads to inter-state marriages where boys and girls from the Jammu province get married to girls and boys from the neighboring states.

In case of boys, the girls they bring home as brides from Punjab or Himachal Pradesh become State

Subjects after the marriage. They are then issued Permanent Resident Certificates (PRCs) by the state authorities after completion of formalities. In case of girls from Jammu province marrying boys from Himachal or Punjab, the girls stand to lose substantially by way of their traditional rights as PRC holders.

In the case listed in the J&K High Court to decide the issue of citizenship, the then Advocate General M A Goni argued "a female descendent of a permanent resident of the State would lose the status of permanent resident of the State and she would not be a permanent resident of the State as defined under Section 6 of the State Constitution[15]".

Going a step further, he contended that by marrying a non-permanent resident of the State, a female descendent of a permanent resident of the State will not only lose the property which she may have acquired in the State before marriage, as a permanent resident of the State but also she would lose all special rights and privileges like employment under the State Government, right to scholarship or any other such privilege as the Government may provide.

Another lawyer, Z A Shah, who appeared for some interveners, chose a more sober argument and said that when a female descendent of a permanent resident married an outsider, she will "lose her status as permanent resident, but will continue to hold property which she may have acquired before marriage and will not be entitled to acquire further property[16]".

It is interesting to note that there is tremendous confusion regarding the rights of the women of Jammu and Kashmir as permanent residents after they marry

outsiders, despite the clear court judgment that they will continue to be "permanent residents" even after marrying "non-permanent residents".

There is confusion that the women married outside cannot buy and sell property. This is a bit surprising because "permanent residents" have clearly defined rights and they can buy and sell property in Jammu and Kashmir.

Since women now continue to be "permanent residents" even after marrying outsiders, they continue to enjoy this inherent right and can sell and buy the property within the state of Jammu and Kashmir.

In fact, it can be argued convincingly that the bar on the women of J&K marrying outsiders from buying or selling property within the state will amount to discrimination based on gender, not allowed under the Indian Constitution as also in progressive civilized societies where equality of genders is a cherished ideal still being pursued vigorously.

Complicated Citizenship Laws

It is not out of place here to discuss the issue of citizenship of the State in more detail and we shall do so in the following paragraphs.

Pertinently, Part III of the Constitution of Jammu and Kashmir, consisting of Sections 6 to 10, deals with Permanent Residents of the State[17]. Under sub-section (2) of Section 1 of the State Constitution, Sections 6 to 8 came into force on October 26, 1956, and sections 9 and 10, on January 26, 1957. Sections 6 to 10 provide as follows:

> "6. Permanent Residents – (1) Every person who is, or is deemed to be a citizen of India under the

provisions of the Constitution of India shall be a permanent resident of the State, if on the fourteenth day of May, 1954

a) he was a State Subject of Class I or of Class II; or

b) having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than ten years prior to that date;

(2) Any person, who before the fourteenth day of May, 1954 was a State Subject of Class I or of Class II and who having migrated after the first day of May, 1947 to the territory now included in Pakistan, returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority of any law made by the State Legislature shall on such return be a permanent resident of the State.

(3) In this section, the expression 'State Subject of Class I or of Class II' shall have the same meaning as in the State Notification No 1-L/84, dated the Twentieth April, 1927, read with State Notification No. 13/L dated the Twenty-seventh June, 1932.

7. Construction of reference to State Subjects in existing laws – Unless the context otherwise requires, all references in any existing law to hereditary State Subjects or to State Subject of Class I or of Class II or of Class III shall be construed as references to permanent residents of the State.

8. Legislature to define permanent residents – Nothing in the foregoing provisions of this part shall derogate from the power of the State Legislature to make any law, defining the classes of person who are, or shall be permanent residents of the State.

9. Special provision for Bills relating to permanent residents – A Bill making provision for any of the following matters, namely –

a) defining or altering the definition of the classes of persons who are, or shall be permanent residents of the State;

b) conferring on permanent residents any special rights or privileges enjoyed by permanent residents;

c) regulating or modifying any special rights or privileges enjoyed by permanent residents, shall be deemed to be passed by either House of the Legislature only if it is passed by a majority of not less than two-thirds of the total membership of that House.

10. Rights of the permanent residents – The permanent residents of the State shall have all the rights guaranteed to them under the Constitution of India.

While interpreting these provisions during the hearings in Dr Susheela Sawhney versus State of Jammu and Kashmir, Justice V K Jhanji said in his verdict: No law defining the Classes of persons, who are or shall be the permanent residents of the State has so far been enacted by the State Legislature in exercise of its power under section 8 of the State Constitution.

Therefore, the definition given in Section 6 of the State Constitution as discussed herein above, stands till date unaltered. The State Legislature could, if it ever desired to modify the definition and make provision respecting laws of status by a permanent resident in an event like marriage of a female State Subject with a non-State Subject, but the State Legislature in its wisdom has not so far thought to enact such law and left Section 6 of the State Constitution intact.

In the final paragraph of his verdict, Mr Justice V. K. Jhanji wrote: ***"Accordingly, I hold that the daughter of a permanent resident of the State of Jammu and Kashmir will not lose status as a permanent resident of the State of Jammu and Kashmir on her marriage with a person, who is not a permanent resident of the State of Jammu and Kashmir[18]."***

Retrograde Thinking

It was this verdict that Mufti Mohammed Sayeed's government tried to overturn in March 2004 when it brought it in the infamous Bill named "***The Jammu and Kashmir Permanent Resident (Disqualification) Bill 2004[19]***". It bears mention here that the Bill was brought in using the powers of the Legislature under Section 8 of Part III of the State Constitution.

The Bill was passed by the Legislative Assembly unanimously within minutes of being moved by Law Minister Muzaffar Hussein Baig of the Peoples Democratic Party (PDP), a reputed lawyer and a legal luminary in his own right. Two main political parties of the State, who pursue Kashmir-centric policies with a vengeance, and are virtually sworn enemies and arch rivals, the PDP and the National Conference (NC), voted together on this Bill.

The aims and objects of the legislation as set out in the preamble were:

"A Bill to provide for disqualification from being a permanent resident of the State on marriage of a female permanent resident with a non-permanent resident".

On becoming an Act, it would have come into force, retrospectively, with effect from October 7, 2002, the day the High Court delivered its judgment. The Act had three sections. Section 1 dealt with title and commencement. Section 2 dealt with disqualification and read:

"Notwithstanding anything to the contrary obtained in any law, notification or judgment, decree or order of any court, a female permanent resident on her marriage with a person who is not a permanent resident shall with effect from the date of such marriage cease to be a permanent resident."

Section 3 provided for interpretation:

"For purposes of this Act, the expression 'permanent resident' means a person who is or is deemed to be a permanent resident under Section 6 of the Constitution of Jammu and Kashmir subject to the modification that a female permanent resident shall cease to be so on her marriage to a person who is not a permanent resident."

Paradoxical, as it may seem, two mainstream national parties, the Congress and the Bharatiya Janata Party (BJP), arch rivals, but who draw their political strength in Jammu and Kashmir from the Jammu region of the state, worked with full vigour to defeat this Bill.

Of course, they did not work together to defeat it but in their own different ways, they contributed to the outcome. The BJP organized massive protest demonstrations, to begin within the Jammu region, and then in several other parts of the country[20]. This unnerved the Congress, a coalition partner of the PDP

in the State Government from November 2002 to July 2008.

The Congress worked within the government, and the Legislature, to ensure that the Bill got defeated in the Legislative Council and did not become a law. This was achieved as Chairman of the Legislative Council Abdul Rashid Dar, of the National Conference (NC), adjourned the House sine die, rather unexpectedly, on March 11, 2004, amid heated discussions on the Bill close to midnight.

Immediately thereafter, Omar Abdullah, who was then the president of the National Conference, threw out Dar from the party[21] who later joined the Congress.

In the preceding pages, we have seen how the women suffer in J&K due to discriminatory practices that are prevalent in the society, due to slanted interpretation of Article 370. We can perhaps best illustrate that gender discrimination indeed exists in J&K by quoting the example of one family alone. It is a coincidence that for the purpose of illustrating this point, we have to turn back to the Abdullah family, the family of late Sheikh Mohammed Abdullah, and later generations.

Sheikh Mohammed Abdullah's son, Dr Farooq Abdullah, married a Christian British citizen, Mollie, and she became a naturalized citizen of Jammu and Kashmir by marrying a male citizen (Farooq). She got all the rights of a state subject though she was a British citizen, and some say she continues to be till date. In fact, her citizenship status is not clear because she has been a very private person and chose to stay firmly in the background. She also stays abroad most of the time and was visible in public, for some days, during the

oath-taking ceremony of Omar Abdullah, her son, as Chief Minister of J&K, on January 5, 2009.

The point being made here is that her children got all the rights in J&K since she was married to a male citizen of J&K. Her son, Omar, married an outsider, Payal, a Hindu, and she became a naturalized state subject by marrying a male citizen of J&K.

Payal and Omar's children have all the citizenship rights in J&K. Both Mollie and Payal, outsiders, one a foreigner citizen as well, became state subjects, after marrying male state subjects of J&K. Their children also became state subjects and enjoy all citizenship rights in J&K.

Now, let us take the case of Sara Abdullah, daughter of Farooq and Mollie, and sister of Omar Abdullah, who is a female state subject of J&K. She married Sachin Pilot, who was a minister in the Central government headed by Prime Minister Manmohan Singh. After her marriage to Sachin, an Indian citizen, Sara's citizenship rights in J&K stand severely curtailed. Neither her husband, Sachin, nor their children, can acquire the State Subject status.

Thus, due to operation of peculiar citizenship laws framed with respect to J&K, courtesy Article 370, the men and women state subjects are subjected to different treatments. Does it constitute discrimination based on gender? This will have to be left to the legal and constitutional experts, for debate and discussions.

Explaining the reasons for the then prevalent confusion regarding the status of women from Jammu and Kashmir marrying outsiders, Mr Justice V K Jhanji wrote:

The controversy regarding the loss of a status of a permanent resident's daughter on her marriage with a non-permanent resident arose because of the judgment in **Prakash vs. Mst Shahni and others, AIR 1965 J&K 83,**[22] decided by a Division Bench of this Court. In this case, Mst. Shahni, who was a permanent resident of the state married, one Pohu Ram of Paul Biyoyan, Teshil Sialkot (British India) who had come as a refugee to the state in 1947. Relying on Section 10 of the British Nationality & Status of Aliens Act, 1914, the learned judges of the Division Bench observed that a married woman acquires the 'domicile' of her husband if she had not the same domicile before marriage.

The Division Bench had not averted to the controversy in issue with reference to Section 6 of the state constitution, read with Notification 1-L/dated 20-04-1927 and Notification No 13-L/1989 dated 27-06-1932.

Further reading of the judgment shows that when the respondent's counsel sought to argue that a female acquires the status of permanent resident being the descendent of a state subject and relied on Note-II of Notification dated April 20, 1927, the learned judges repelled the contention by observing; -

"In view of what has already been stated that a female takes the domicile of her husband on marriage[23], this explanation has no application to the case of the respondent, Mst. Shahni. If she had not married a person who was a resident of another place outside the state, she could have no doubt claimed the status of her father, but on her marriage she lost her status in the state and acquired a new status of being a resident of Sialkot."

49. The judgment of the Division Bench is almost based on the rule governing the domicile of a married

woman and the law relating to Laws in England under the Act of 1914. Note-III of Notification dated 20th of April, 1927, was interpreted in the light of British Act. However, since then, the English law has made fundamental changes in the domicile of wife. Until 1974, the rule was that the domicile of a husband was communicated to his wife immediately on marriage and it was necessarily and inevitably retained by her for the duration of the marriage. In Formosa Vs Formosa (1962) (3) All, E.R. 419, this rule was much criticized as "the most barbarous relic of a wife's servitude" and was abolished by Section 1 of the Domicile and Matrimonial Proceedings Act 1973. Now, the domicile of a married woman is to be ascertained the same way as the domicile of an independent person is ascertained. Because of change in British laws with regards to 'domicile' of married women, the judgment in Mst. Shahni's case (Supra) no longer holds the field and therefore, is, hereby over-ruled.

The three-judge Bench of the Jammu and Kashmir High Court, while giving its judgment, had alluded to the British law of the 1973, and turned down the plea to be guided by much older and archaic British law on the same subject that was in vogue 60 years earlier, in 1914. In contrast, the State of Jammu and Kashmir wants the women of the state to be governed by the 1914 law, and not the 1973 law, and later developments.

It is worthwhile to actually reproduce part of the British law, Section 1 of the Domicile and Matrimonial Proceedings Act 1973[24], being referred to herein above which is the prevalent law to determine the domicile of the women, almost worldwide now. For our reference, Part I quoted in the judgment is relevant and it follows.

PART I

DOMICILE

Husband and wife

1. Abolition of wife's dependent domicile.

(1)Subject to subsection (2) below, the domicile of a married woman as at any time after the coming into force of this section shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile.

(2)Where immediately before this section came into force a woman was married and then had her husband's domicile by dependence, she is to be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after the coming into force of this section.

(3)This section extends to England and Wales, Scotland and Northern Ireland.

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PART III

Laws, Regulations and Rules passed thereunder.

JAMMU AND KASHMIR LEGISLATIVE ASSEMBLY SECRETARIAT, JAMMU

THE JAMMU AND KASHMIR PERMANENT RESIDENT (DISQUALIFICATION) BILL, 2004
[L.A. Bill No 9 of 2004]

A Bill to provide for disqualification from being a permanent resident of the State on marriage of a female permanent resident with a non-permanent resident.

Be it enacted by the Jammu and Kashmir State Legislature in the Fifty-fifth Year of the Republic of India as follows: -

1. *Short title and commencement*. – (1) This Act may be called the Jammu and Kashmir Permanent Resident (Disqualification) Bill Act, 2004.

(2) It shall be deemed to have come into effect from 7th October, 2002.

2. *Disqualification*. Notwithstanding anything to the contrary contained in any law, notification or judgment, decree or order of any court, a female permanent resident, on her marriage with a person who is not a permanent resident, shall with effect from the date of such marriage, cease to be a permanent resident.

3. Interpretation. For purposes of this Act, the expression `permanent resident' means a person who is or is deemed to be a permanent resident under section 6 of the Constitution of Jammu and Kashmir subject to the modification that a female permanent resident shall cease to be so on her marriage to a person who is not a permanent resident.

Secretary

STATEMENT OF OBJECTS AND REASONS

Section 6 of the Constitution of Jammu and Kashmir defines the expression permanent residents and accordingly the persons belonging to class 1 or class 2 of State Subjects or having lawfully acquired immovable property in the State shall be deemed to be permanent residents. However, the expression class 1 and class 2 of State Subjects shall have the same meaning as assigned to it in the State Notification No. I-L, 84, dated 20th April, 1927, read with State Notification No. 13/L dated 27th June, 1932.

Accordingly, a female permanent resident acquires the status of her husband and ceases to be a permanent resident on her marriage to a person who does not belong to any class of the permanent resident.

The Full Court in case State of Jammu and Kashmir versus Dr Susheela Sawhney has held as under : --

(a) that there is no provision in the existing Law dealing with the status of a female permanent resident who marries a non-permanent resident:

(b) that the State Legislature has powers under section 8 of the Jammu and Kashmir Constitution to make such a Law.

It is, therefore, necessary to enact the law on the subject and also to remove the mist in the minds of the people at large. The Jammu and Kashmir Permanent Resident (Disqualification) Bill, 2004, seeks to attain the said objective. It provides that a female permanent resident on her marriage with

non-permanent resident shall lose the status of a permanent resident. The said law shall be effective from the date of the announcement of the aforesaid judgment dated 07-10-2002. The proposed law does not alter the legal position of female descendants of permanent residents in the matter of inheritance which will continue to be in accordance with the personal law applicable to them.

Hence the Bill.

MINISTER INCHARGE
LAW AND PARLIAMENTARY AFFAIRS

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CHAPTER - 4

Interlocutors' Game Play

RECOMMENDATIONS forming part of Interlocutors' Report are highly debatable among political leadership, activists and scholars since it is seems as one sided and fabricated to suit a preconceived plan. The report has been subjected for a wide debate. Here an attempt has been made to discuss and analyze the impact of Interlocutors' Report[1] on the polity of Jammu and Kashmir. We will see whether the three Interlocutors appointed by the Centre and their recommendations, have helped resolve pending issues in J&K or served to further complicate the competing narratives.

Indeed, competing narratives for each event, or happening, is a way of life for the people in J&K and each narrative is contested by another section. The narrators also try to establish the supremacy, and correctness, of their own respective narrations, to the exclusion of other narratives. This creates a piquant situation for the ordinary people who are baffled by the multitude of narratives, each trying to monopolies the discourse.

The Centre's Interlocutors did their bit in their own way, adding to the cacophony of narratives on J&K. Veteran journalist Dileep Padgaonkar, former Editor of The Times of India, academician Radha Kumar of the Delhi Policy Group and retired bureaucrat MM Ansari were appointed as members of

Group of interlocutors on Jammu and Kashmir by the Central Government in October 2010.[2] They were appointed when the Kashmir Valley had started limping back to normalcy after the summer unrest of 2010.

The committee owed its birth to unrest and was therefore, clearly focused on Kashmir, though it made pious declarations about engaging with people in Jammu and Ladakh, the other two regions of J&K, also.

A little more about the tragic circumstances which engendered the birth of this Group first. The trouble in Kashmir Valley started after a 17-year-old boy, Tufail Ahmed Mattoo, died after receiving head injuries, on June 11, 2010.[3] It is not clear whether he was hit by a teargas canister, as was speculated in the media or the injuries were the result of beating by security personnel, as alleged by some locals in Srinagar.

Sporadic protests started after this incident, to begin with, in Srinagar city but later these spread to other parts of Kashmir, day after day. The State Government put a brave face and went about things, in business-as-usual mode. At that juncture, it was busy making preparations for hosting a conference of the presiding officers of Legislatures from all over India, with Lok Sabha Speaker Meira Kumar herself to preside. The event was meant to showcase Kashmir and its famed beauty using the media focus and mileage it was expected to generate.

The event was also meant to leave behind, as it were, the bad dreams of two successive summers (2008 and 2009) of discontent in Kashmir. It bears mention here that in 2008, the Amarnath land row[4] had

disrupted normal life in Jammu and Kashmir. The land row had regional and communal dimensions and it became a serious Jammu versus Kashmir dispute. For at least two months - July and August 2008 – the agitation engulfed the two regions. It scarred the polity and the people of J&K badly.

Prior to the 2008, for several decades, there had not been an agitation of such large proportions as was the Amarnath land row, in the Jammu region. This, despite the fact that the issue of regional discrimination had ignited agitations, time and again. The earlier agitations were grounded in the allegations about Kashmir region dominating Jammu, unfairly, in different spheres and getting more developmental funds, jobs etc. The Amarnath land row was the mother of all agitations as the vigour and fires of religious fervour formed its inseparable ingredient.

Time Frame

After the Amarnath land row ended, Legislative Assembly elections were held in J&K in November-December 2008. As happened in 2002, the elections resulted in a hung assembly again. Omar Abdullah, the third generation scion of the Abdullah dynasty founded by Sheikh Mohammed Abdullah, became the Chief Minister of the State on January 5, 2009,[5] after entering into an agreement with the Congress. It bears mention here that the Congress ran a coalition government with the PDP, between November 2002 and July 2008.

Barely four months after Omar assumed office, the Kashmir Valley was rocked by the Shopian rapes cum drowning case.[6] Even as the Government braced up to

bury the ghosts of Amarnath land row, it found that allegations regarding rape and subsequent drowning of two local women in Shopian district had gained widespread currency across the Valley. The allegations were deadly in their portent as unnamed security forces personnel were accused of committing the heinous crimes.

The Shopian case ruined peace in Kashmir for the entire summer of 2009. Jammu and Ladakh regions remained unaffected by the agitation over this infamous case.

In 2010, the State Government tried to attract tourists in its attempt to revive the local economy. Restoration of peace being a pre-requisite for tourist footfalls, maintaining peace, at all costs, seemed to be the top priority of the government; more so, during the summer months when Kashmir witnesses heavy tourist influx. Since two earlier successive summers of 2008 and 2009 had gone waste due to agitations, the government was apprehensive that a third successive summer of unrest may cause incalculable damage.

Coming back to the death of Tufail Ahmed Mattoo, it happened in the second week of June just before the scheduled arrival of presiding officers of Legislatures of India to Srinagar, the summer capital. The state government focused its energies on making the event a grand show, hoping to send positive signals about Kashmir during and afterwards. However, on June 20/21, deaths of two more youths in sporadic clashes with the security forces provided the spark for a massive eruption in Kashmir.

The eruptions ended months later, with July, August and September 2010 witnessing agitations,

clashes between protestors called 'stone pelters'[7] and security forces, injuries, and subsequent deaths. A vicious cycle of agitation, clashes, injuries and deaths, was witnessed. Each death of a protestor led to a renewed agitation, leading to more clashes, more injuries and more deaths. The final toll was over 110 and the summer months were gone, as Kashmir grieved over the rising number of deaths and mayhem.

Not a single protestor died due to of firing by the Army which was summoned by the civil administration for organizing some flag marches when things appeared to be spinning out of hands. The over 110 deaths, happened in clashes between the State Police (backed by the Central Reserve Police Force - CRPF) and the 'stone pelters'.

In 2010, again, there were no agitations in the Jammu and Ladakh regions which remained unaffected by the disruptive events unfolding in Kashmir. This helps put things in perspective as to how the aspirations, concerns and issues impacting the three geographical regions of Jammu, Kashmir and Ladakh are totally divorced and different from one another. Except for the fact that the three regions are part of the same State, is there is any commonality among them? Of course, the politicians, the bureaucracy and consequently the government are the same for them.

It was after such cataclysmic events that the Interlocutors were appointed and they submitted their report or recommendations to Union Ministry of Home Affairs (MHA) in October 2011, exactly a year later. This report remained away from public scrutiny and debate for several months,[8] though some parts of it

were selectively leaked to some journalists and media houses. This was done apparently as the Government wanted to gauge the reaction of the masses, in J&K and all across India, to its contents.

Later, after a delay of several months, the report was made public by suddenly uploading it on the website of the MHA.[9] After that, the report was downloaded by journalists, scholars and researchers, and was debated in J&K, all over India and even abroad. It has been dissected threadbare in different forums and by experts focused on J&K.

Biased Thinking

The report was titled: ***A New Compact With The People of Jammu and Kashmir.***[10] This, in itself, sounds rather loud as if this is a treaty between two sovereign entities, the first being the Interlocutors and the second the people of J&K. Or may be the first entity is the people of J&K and the second entity the Interlocutors. The reference to the "people of J&K" is erroneous because that will mean the views of the people from Jammu, Kashmir and Ladakh regions while it is essentially a Kashmir-centric report, and references to Jammu and Ladakh are incidental.

The report was debated animatedly in the civil society of Kashmir Valley, in various political parties and even the separatist groups. However, in Jammu and Ladakh regions it was ignored altogether, for the people of these two regions hold the view, largely, that there is nothing in the report for them. The intelligentsia in these parts decided, rightly or wrongly, *ab-initio*, that this report would be Kashmir-centric just as several such Central government initiatives of

the past have proved to be. Therefore, for them the right option or choice was to ignore it to show their contempt and derision in no uncertain terms.

The overwhelmingly Kashmir-centric focus of the report becomes clear when we read the State Autonomy Committee (SAC)[11] report. It bears mention here that the National Conference (NC) government of J&K, then headed by Farooq Abdullah, had adopted the autonomy report in the State Legislature in June 2000. At that time, the NC was a part of the National Democratic Alliance (NDA) headed by the Bharatiya Janata Party (BJP). However, the NDA government summarily rejected the autonomy report as its implementation entailed several changes in the Constitution of India and reversal of application of several Central laws from Jammu and Kashmir.

The SAC report consists of 15 chapters and also carries nine Appendices. The last chapter, Chapter XV, is titled "***Safeguards for the Future***[12]. The first paragraph of the chapter reads: *In the preceding chapters, we have discussed in detail the extent of erosion caused to the State autonomy from time to time and also suggested remedial measures. That completes the job assigned to us by the first item of the terms of reference. There are, however, two other items which require our consideration. The first is to ensure the "inviolability" of the final settlement, and the other is to keep in mind the need to maintain "harmonious" relations with the Centre.*

The next paragraph reads: *A suggestion has been made that Article 258 should be invoked for entrusting to the State "functions in relation to any matter to which the executive powers of the Union extends".*

This would put a seal on the record of the past. "Functions" so "entrusted" can always be recalled back. This issue is not one of executive "functions" but legislative "powers" apportioned between the Union and the State under two solemn ***compacts***[13] *between them, the Instrument of Accession in 1947 and the Delhi Agreement of 1952 to which the President's Order of May 14, 1954, gave constitutional sanction besides, of course, Article 370 itself. To them must we return if popular sentiment is to be respected and resentments assuaged. It is first and foremost a moral issue. It also has important constitutional and political aspects. In the nature of things, redress can only be through* ***another compact***[14] *between the Union and the State.*

The third paragraph of this chapter reads: *Ever since, Article 370 has acquired a dangerously ambiguous aspect. Designed to protect the State's autonomy, it has been used systematically to destroy it.* ***A compact***[15] *is necessary between the Union and the State which makes ample redress and finalizes their relationship by declaring a "Constitutional Understanding" that Article 370 of the Constitution of India can no longer be used to apply to the State of Jammu and Kashmir any other provisions of the Constitution of India beyond the ones extended under 1950 Order and the Delhi Agreement, 1952. This could be embodied in a new Article that specifies the agreement as part of the unamendable basic structure of the Indian Constitution.*

Hollow Compact

This thus becomes clear that the word ***compact*** used by the Interlocutors in the title of their work **"A New Compact With The People Of Jammu And Kashmir"**[16] is from the SAC report. It is a formulation that was prescribed by Dr Farooq Abdullah, in 2000, and the Interlocutors endorsed it 11 years later. The entire formulation of the Interlocutors is thus open to the accusation of being inspired primarily by the National Conference, a partner in the United Progressive Alliance (UPA) II government at the Centre with Dr Farooq Abdullah as a cabinet minister.

The genesis of the word ***compact*** is in the SAC report, which was conceived, contrived, conspired and masterminded by the National Conference (NC). It is then fair to construct the notion that the Interlocutors, instead of acting as independent observers as their designation sounded, were tasked to bail out the NC and this is what they sought to do. Is this not why they borrowed even the word and construction ***compact*** in the title of their report?

The PDF[17] version of the 176-page report of the Interlocutors was uploaded on the Internet on May 24, 2012. It has been divided into six chapters.

Incidentally, it needs to be emphasized that the use of words like inter-regional goodwill and harmony in the context of Jammu and Kashmir, when used to describe the relations between Jammu, Kashmir and Ladakh is entirely inaccurate, unnecessary and out of place. The people of the three regions lead lives independent of each other in all spheres, with barely any inter-dependence. All three – Jammu, Kashmir and Ladakh– are self-contained even though not self-

sufficient. The Kashmir region geographically lies to the north of Jammu and all supplies to it go through Jammu. Of course, the three regions are constituent units of the State of Jammu and Kashmir.

Regional Rivalries

Despite claims to the contrary, often made by leaders, at both the State and the national level, about the compatibility of the three regions, they have nothing in common except a government which rules over all of them. Theirs is a coming together due to compulsions, where cohabitation is not a decision taken by the three partners, independently and deliberately, but thrust on them by history.

The ground reality is that there is intense inter-regional rivalry between Kashmir and Jammu regions, as also between Kashmir and Ladakh regions, particularly the Buddhist-majority Leh district. In the recent past, the overwhelming centrality accorded to Kashmir in any discourse on Jammu and Kashmir has only sharpened the divide between these regions.

This is starkly admitted by the Interlocutors in Chapter 2 (Page 51) of their report, where they discuss, under 2.2, Regional Devolution of Powers. The report says: *The real or perceived discrimination felt by Jammu and Ladakh vis-à-vis the Valley accounts for the campaign that the Buddhist-majority population of Leh has waged since 1948 for a Union Territory status for Ladakh*[4]*. It also accounts for the demand voiced from time to time in the Hindu-majority areas of Jammu for a separate State. Both of them seek closer integration with the Indian Union.*

Therefore, the Interlocutors give their judgment that indeed in Jammu and Ladakh, the aspirations of the people are for the closer integration with the Indian Union. However, they fail to say in clear terms that the Valley tends to pull in the opposite direction; of lesser integration with the Indian Union or that the people of Valley, at least a section of them, try to undermine the closer ties being sought by Jammu and Ladakh. This divergence of political aspirations, concerns, grievances and interests needs to be accommodated. However, Article 370 creates a situation whereby the aspirations of the Valley only are addressed and given primacy.

The discourse in the media and local papers, both in Jammu and Srinagar cities – respectively winter and summer capitals of the State, in 2010, was that the Interlocutors were meant to defuse the crisis created by the 'stone pelters' who virtually ruled the Kashmir streets then. Whatever may be said about the utility or the purpose of appointment of these interlocutors, it was widely believed and reported in the media in 2010 that the Central government was trying to bail out Chief Minister Omar Abdullah, who appeared to be in deep crisis.

The interlocutors had taken up their assignment on October 13, 2010[18] and were tasked to submit a report on J&K to the Union Ministry of Home Affairs (MHA), the appointing authority. After a year, on October 12, 2011 they completed their task and submitted their omnibus report on J&K, what was wrong with it and how things could be set right, to Union Home Minister P Chidambaram.[19]

The report they submitted to the MHA was not made public for several months and remained away from public eyes till May 2012 when it was suddenly posted on the ministry website. Before being made public in this manner, it was selectively leaked to some journalists, apparently to start a debate in the public domain.

During this period, some Right to Information (RTI) activists tried to get a copy of the report under RTI act 2005 but their requests were turned down. The report of the interlocutors also referred to Article 370 and made some recommendations about it[20]. This is why it is relevant for inclusion in the present study.

Summer Unrest

The summer of 2010 virtually belonged to the 'stone pelters' in the Kashmir valley as a new method of agitation invented overnight. Virtually overnight, Kashmir got transformed into a simmering volcano as stone-pelting protestors burnt government vehicles, buildings and other properties. This state of affairs continued for almost three months between late June and late September that year. Ding-dong battles between security forces and stone-pelting protestors often led to heavy baton charges, teargas shelling and even firing, leading to several deaths. In fact, by the time some semblance of order was restored, over 110 people had lost their lives.

It was in this backdrop that the interlocutors were appointed by the MHA as Chief Minister Omar Abdullah looked absolutely out of sorts and out of control, unable to do anything right. It needs to be mentioned here that the National Conference (NC) is a

partner of the United Progressive Alliance (UPA) government at the Centre. The appointment of the interlocutors can thus be seen as an attempt by the Union government to bail out an alliance partner.

A wide range of media reports suggest that the Interlocutors did not carry much conviction with a large chunk of ordinary citizens of Kashmir. According to their own report, the Interlocutors had been asked to spend at least one week every month in Jammu and Kashmir and this was a dictat they followed. They conducted meetings with ordinary citizens, political parties, non-governmental organizations (NGOs) and other people who showed an inclination to meet them.

The Interlocutors travelled throughout the state but it was clear, from the very beginning, that their mandate being what it was, they would focus more on Kashmir. Most opposition parties in Jammu and Ladakh regions accused the interlocutors of pursuing a Kashmir-centric agenda and approach to the detriment of the other two regions. [21]

Temporary versus Special Debate

The interlocutors recommended that Article 370 should be made special [22], instead of being temporary as it is defined at present in the Indian Constitution. In Jammu and in Ladakh regions, most parties, individuals and NGOs did not make any such suggestions to the interlocutors. A perusal of the report does not make it clear why the interlocutors decided to comment on Article 370 in the first place. They knew full well that the main opposition Bharatiya Janata Party (BJP), besides other parties operating in Jammu

and Ladakh, will not take such a recommendation kindly. Then, why did they make a recommendation to strengthen Article 370? Perhaps they will explain the reasons for their recommendation some day, in a different time and context.

This recommendation of the Interlocutors is, in fact, a complete endorsement of the National Conference (NC) demand about Article 370, and is contrary to and seeks to exclude the divergent viewpoints expressed by other parties that operate in the State of Jammu and Kashmir. The State Autonomy Committee (SAC) too had made a recommendation that Article 370 be made "special" instead of "temporary"[23].

On page 5 of their report, the Interlocutors made their recommendations about issues and said: Delete the word 'Temporary' from the heading of Article 370 and from the title of Part XXI of the Constitution. Replace it with the word 'Special' as has been used for other States under Article 371 (Maharashtra and Gujarat); Article 371 A (Nagaland); 371 B (Assam); 371 C (Manipur); 371 D and E (Andhra Pradesh); 371 F (Sikkim); 371 H (Arunachal Pradesh); 371 I (Goa). ***It should be clear to us that the word 'special' has been used in the context of Article 371 from A to I which deal with different States and is not applicable to Article 370. Since demands are being made about making Article 370 special, can it be done by moving this Article in to section (J) of Article 371? Moving the contents of Article 370 to Article 371 (J) will mean that it will become 'special' automatically and (J) can then easily correspond to Jammu and Kashmir.***

The Interlocutors' recommendation about this most contentious article of the Indian Constitution is a *carbon copy* of the stance the NC adopted in the SAC report on this issue. The SAC report "was placed on the table of two Houses of Jammu and Kashmir Legislature on April 16, 1999. It was subsequently adopted by the State Legislative Assembly on June 26, 2000, and by the State Legislative Council on June 27, 2000, in a special session convened for this very purpose".

(Extract from the SAC report published by the General Administration Department (GAD) of Jammu and Kashmir Government)

State Autonomy Committee Report

In Chapter XIII of the SAC report, titled "Recommendations", the first recommendation is about Article 370 and it is titled "Change in the title of Part XXI and heading of Article 370[24]". It reads:

The word 'temporary' has been used in the title of Part XXI and heading of Article 370 of the Constitution of India. In this context, it would be relevant to mention as to how and why it came to be used therein. This was because of the provision contained in clause (3) of this Article which came into being at a time when the Constituent Assembly of the State had yet to be convened.

This Article could cease to be operative if the President of the Republic were to issue a notification to this effect on the basis of a recommendation of the State Constituent Assembly. It could also be made operative with modifications and exceptions by a

similar process and from such date as may be specified by the President.

The Constituent Assembly ceased to exist after the Constitution for the State was adopted by it in November 1956. It did not make any recommendation for the removal of this Article.

So, it should have been indicated as early as 1956 that it would be a misnomer to call Article 370 "Temporary Provision". In fact, it had become and had to continue as a special provision of the Indian Constitution applicable to the State of Jammu and Kashmir. It would be appropriate to quote Jenab Sheikh Sahib's views expressed in this regard while addressing the State Constituent Assembly on August 11, 1952:

"Here I would like to point out that the fact that Article 370 has been mentioned as a temporary provision in the Constitution does not mean that it is capable of being abrogated, modified or replaced unilaterally. In actual effect, the temporary nature of this Article arises merely from the fact that the power to finalize the Constitutional relationship between the State and the Union of India has been specifically vested in the Jammu and Kashmir Constituent Assembly. It follows that whatever modifications, amendments or exceptions that may have become necessary either to Article 370 or any other Article in the Constitution of India in their application to the Jammu and Kashmir State are subject to the decisions of this sovereign body."

Accordingly, it is recommended as under:

i. That the word 'temporary' be deleted from the title of Part XXI of the Constitution of India; and

ii. That the word 'temporary' occurring in the heading of Article 370 be substituted by the word 'special[25]'.

The SAC report said that strengthening of Article 370 was the only way out of satisfying the addressing the discontent. At one place, it says: *Such constitutional understandings have been formulated in other democracies. The complexities of our situation render it the best, perhaps the only, course for removing the debris of an unhappy past and building, in its place, a relationship between the State of Jammu and Kashmir and the Union of India which reflects the most vital aspect of federalism: mutual trust and respect.*

Interlocutors & NC

The formulation of the Interlocutors and the NC are thus clearly the same when it comes to Article 370. For this reason alone, there is bound to be substantial opposition by other parties and stakeholders to applying these recommendations on ground. In fact, there is a lot of confusion among the ordinary people, across Jammu & Kashmir, and beyond in most parts of India and abroad, regarding the so-called special status of Jammu and Kashmir due to Article 370.

The word "special" was added to the title of provisions of Section XXI of the Constitution of India through the 13th Constitutional Amendment.[26] The word "special" is not meant for describing the State of Jammu and Kashmir though erroneous and factually wrong claims in this regard are widely prevalent.

Incidentally, it also bears mention here that on paper, the Interlocutors discussed the various "Options

on substantive issues" and the first one to be discussed under this heading was the options regarding Article 370. On page 46 of their report, the Interlocutors enumerate four different options on Article 370 and these are:

(1) Retain the word 'Temporary' used in relation to Article 370 even while revamping institutions of governance to make them efficient, transparent and accountable; or

(2) Replace the word 'Temporary' with the word 'Special' to assert the unique status of the State. The word applies to other States as well under Article 371;

or

(3) Use any other word which will more appropriately reflect the status of the State; or

(4) Abrogate Article 370.

While discussing Centre-State relations, the Interlocutors put Article 370 at the centre of the debate and admit that the "mainstream opinion in the State is divided on the issue of the import of Article 370 of the Constitution of India".

Elsewhere in their report, the Interlocutors made some other recommendations regarding Article 370. On page 45, under (18.) [27] they recommended.

18. In the exercise to fine-tune Article 370, we further believe that the interests of the State and the nation alike will be served if certain subjects from List III of the Seventh Schedule are transferred to the State List. These would include:

Entry 6 Transfer of Property
Entry 13 Civil Procedure
Entry 14 Contempt of Court

Entry 15 Vagrancy, nomadic and migratory tribes
Entry 16 Lunacy and mental deficiency
Entry 17 Prevention of cruelty to animals
Entry 17 B Protection of wild animals and birds
Entry 18 Adulteration of foodstuffs
Entry 20 Economic and Social Planning
Entry 20 A Population control and family planning
Entry 22 Trade Unions
Entry 23 Social security and social insurance; employment and unemployment
Entry 25 Education, subject to certain exceptions
Entry 27 Relief and rehabilitation of persons displaced
Entry 30 Vital statistics
Entry 36 Factories
Entry 40 Archeological sites and remains with certain exceptions
Entry 42 Acquisition and requisitioning of property
Entry 43 Recovery of claims in respect of taxes etc
Entry 45 Inquiries and statistics

These are relatively minor matters which we needed to get out of the way in order to focus on the substantive issues regarding Jammu and Kashmir's distinctive status, the Interlocutors said.

It can be debated as to whether the transfer of all such powers and subjects to the domain of the state government will lead to any better responses or results. The fact of the matter is that the deficit of good governance, in the subjects already under its domain, leaves a lot to be desired and promotes discontent among ordinary masses. If the state government gets more subjects under its ambit, it is unlikely that it will be able to deliver in any better manner due to inherent inefficiencies and contradictions successive state

governments have been plagued with and encountered, many of their own makings.

The entire construction and narrative about Article 370 in the Interlocutors' Report is thus essentially ***"of the NC, for the NC and by the Interlocutors"***.

We have seen how the Interlocutors' Report has muddied the proverbial waters of discourse in J&K further. Not that there was a single uncontested narrative available earlier on which consensus was possible in a hurry. Of course, another way of looking at the complete report of the Interlocutors is that they have added to the written literature on the subject of Jammu and Kashmir.

Since they have referred to many relevant issues, their report can help educate the ordinary masses as also the cognoscenti in understanding the problem better, perhaps.

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CHAPTER- 5

Impact on West Pakistan refugees

IN August 1947, when the British left India and the new nation of Pakistan was born, there were communal clashes in several areas. Hindus and Sikhs got uprooted from the areas which were to become a part of Pakistan and they moved towards Indian territories. There was also the migration of Muslims from several areas to territories which were to be included in Pakistan. To begin with, Jammu and Kashmir was not a part of India or Pakistan as its ruler, Maharaja Hari Singh, vacillated over joining either nation due to the peculiar conditions prevailing in his kingdom. It had a Muslim majority but Hindus and Sikhs were also there in substantial numbers.

Sialkot and other contiguous areas of West Punjab had substantial number of Hindus and Sikhs living in them. However, these people chose to move towards Jammu and other areas of J&K which had a Hindu majority when communal clashes broke out. This happened at a time when Muslims were migrating, in large numbers, from Jammu towards Sialkot and other parts of West Punjab.

In those uncertain times, migration of Hindus and Sikhs to J&K got a fillip after Maharaja Hari Singh signed the Instrument of Accession to join India in the last week of October 1947. Since J&K became a part

of Indian territories, Hindus and Sikhs living in Sialkot and other areas rushed towards nearby Jammu for safety.

In this chapter, we examine the conditions of the Hindus and Sikhs who got uprooted and moved into J&K. These people were granted Indian citizenship in due course of time but their legal status remains undefined till date, 65 years after they crossed an international border, between West Punjab (Pakistan) and Jammu and Kashmir (India). They have not been declared as refugees and are erroneously called displaced persons (DPs). This erroneous nomenclature has deprived them of any support from United Nations (UN), till date.

It bears mention here that the legal and constitutional position of these people, originally inhabitants of what was undivided Punjab (and became West Punjab after the creation of Pakistan) has not been defined, adequately, till date. They are caught in a virtual time warp and very little, if any official data, exists in the records of the Jammu and Kashmir government.

In fact, even this data has been collated by the official agencies, from time to time, only due to the issue being raised by some Members of Parliament in the Lok Sabha and the Rajya Sabha, sporadically, and not systematically. This data too has been gathered mainly from the activists who have been working for the welfare of these people and hail from this community.

Some records pertaining to these people exist in the offices of the Deputy Commissioners of Kathua, Samba and Jammu districts, where these people have

predominantly been living since 1947. These records are also available, piecemeal, in the office of the Divisional Commissioner of Jammu. In fact, the Divisional Commissioner of Jammu has to, at times, act as the nodal official whenever some Parliamentary Standing Committee members visit the region to conduct field studies and meet the 'West Pakistan refugees'.

Most of the documents that have been used in this chapter were provided by activists of the 1947 West Pakistan Refugees Action Committee headed by Labba (Labha) Ram Gandhi. The most authentic, reliable and extensive records pertaining to these people, who call themselves as '1947 West Pakistan Refugees', have been provided by Mr Gandhi himself, who has been relentlessly pursuing the cause of these Indian citizens living in Jammu and Kashmir virtually as persona ***non grata***.

The main grievances of these refugees are that they are denied basic citizenship and political rights in J&K. To justify its stand, the State of Jammu and Kashmir refers to its special status under Article 370 of the Constitution of India and the special provisions of J&K Constitution under which a distinction can be made between the rights of the permanent residents of the state and those who are not the permanent residents, according to Seema Nargotra, of the Department of Law, Jammu University.

Ms Nargotra was involved in a study on the West Pakistan refugees conducted for Centre for Dialogue and Reconciliation (CDR) by Rekha Chowdhary, of the Political Science Department, Jammu University.

The Jammu region, particularly the city of Jammu and its periphery, nearby towns like Nagrota, Purkhoo, Mishriwala and areas around Akhnoor had to absorb refugees in hundreds, thousands and lakhs during the last six decades. Successive waves of refugees descended on these parts and whoever arrived here has stayed put.

The first wave of refugees arrived in these parts, in hordes, after the Partition in 1947 when communal frenzy in several areas ripped the sub-continent asunder. At that time, thousands of Hindus from what was then West Pakistan arrived in Jammu and Kashmir in an attempt to save their lives and in search of a life of dignity. This was not to be.

These Displaced Persons (DPs) from West Pakistan became Indian citizens but the Constitution of Jammu and Kashmir bars them from acquiring the citizenship of that State. As such, these hapless people have been staying in J&K for the last over 65 years as of February 2013 but cannot get employment in State cadres. Their children cannot get admissions into professional colleges run by the State Government.

They also suffer from several other disabilities which are unparalleled. Worldwide, there may not be an example of the types of disadvantages and hardships these people have faced and continue to face in their day to day life. Generation after generation has been living in Jammu and Kashmir but the State is not willing to give them rights equal to other ordinary citizens.

The 1947 Pakistani Refugees Action Committee tries to organize these people so that they can gain some bargaining strength with the political

establishment as also the government. However, their numbers are such that they cannot make any significant dent in the political fortunes of any party. One reason for their political irrelevance of sorts is that they are spread very thin in areas along the International Border (IB) and Line of Control (LoC).

It bears mention here that these DPs are eligible to vote in parliamentary elections. However, since they do not hold Permanent Resident Certificates (PRCs), they cannot vote in the Legislative Assembly elections. According to official records available with the State Government, during the holocaust of 1947, a total of 5,764 families consisting of 47,215 people migrated from West Pakistan and got settled in Jammu, Kathua and Rajouri districts of the Jammu division[1].

The leaders of these DPs claim that the actual number of these refugees is much higher since not all of them got themselves properly enumerated and got their particulars recorded, officially. As of February 2013, Labba Ram Gandhi claims that the number of these recorded refugees has seen more than a fourfold increase and in official records alone they will number over two lakh. He goes on to add that since no census has been done, the number may not be very accurate.

No land was allotted to them. However, many of these refugees occupied Government lands as also Evacuee Property (EP) lands. EP lands are lands which were lying vacant because their Muslim owners had migrated to Pakistan during Partition. These lands were allowed to be retained by them (up to 12 acres of Khuski or unirrigated or eight acres of Aabi or irrigated land) subject to certain conditions. As a result, 46,466 kanals of State/EP land stand retained by

these refugees under Cabinet Order No 578-C of 1954[2].

These Hindu DPs have been struggling to get civil and political rights but for the last 65 years (from 1947 to 2012), they have failed to get them. Successive governments promised that their problems will be addressed and a way out found to settle them and mitigate their sufferings. These promises remain unfulfilled and the DPs continue to lead miserable lives, immersed in poverty and squalor.

The demand of the West Pakistan refugees that they should be given the civil and political rights is under consideration of the government, according to Wadhwa Committee report[3].

Wadhwa Committee

The Jammu and Kashmir government, during the chief ministership of Ghulam Nabi Azad, set up a committee in May 2007 to look into the demands and problems of Displaced Persons (DPs) living in the state. The committee was headed by G D Wadhwa, IAS, Financial Commissioner (Revenue), and it looked into the demands and problems of the DPs of 1947, 1965 and 1971 from Pakistan Occupied Kashmir (POK) and the DPs from West Pakistan.

The report and recommendations of the committee, spread over 55 pages, has been gathering dust in government records (as of November 2012), over five and a half years after the committee was set up. It also bears mention here that the committee was constituted 50 years after the Constitution of Jammu and Kashmir was adopted in January 1957, and 60

years after the Partition when the West Pakistan refugees came into the State and settled here.

The committee was constituted wide Government Order No Rev/Rehab/151 of 2007, dated 09-05-2007.

Constitution of the Committee

Vide Government Order No Rev./Rehab./151 of 2007 dated 9-5-2007, a committee under the Chairmanship of Shri G D Wadhwa, IAS, Financial Commissioner (Revenue) has been constituted to look into the demands and problems of Displaced Persons of 1947, 1965 and 1971 from Pakistan Occupied Kashmir (POK) and Displaced Persons from west Pakistan.

A copy of the Government Order dated 9-5-2007 is available as an Annexure to this report. (Please see Annexure at the end of this chapter)

The terms of reference of the committee are as under:

(i) Enlist the families displaced during 1947, 1965 and 1971 from Pakistan Occupied Kashmir (POK) and those displaced from Pakistan separately.

(ii) Identify the problems of these people.

(iii) Study the adequacy of measures taken by the government so far for addressing the problems of these people

(iv) Suggest measures, if any, necessary for solving the pending problems of these DPs once and for all

The first meeting of the committee was held at Jammu on 19-05-2007[4] to which, apart from other members, representatives of all groups of displaced persons, i.e., from West Pakistan and Pakistan

Occupied Kashmir [1947, 1965 and 1971 (Camp, Non-Camp)][5] were invited. The memoranda of demands submitted by the representatives of the said displaced persons were discussed and the measures to redress the problems to make up the deficiency of land/payment of compensation, verification of records and other related issues and demands were discussed in detail.

The second meeting of the committee was held on 08-06-2007[6]. More representatives of displaced persons participated and the demands, orders and circulars concerning the displaced persons were discussed. The third meeting of the committee was held on 06-07-2007[7]. In the meeting, the chairman reviewed the progress made in respect of implementation of decisions taken earlier. The fourth meeting of the committee was held on 23-07-2007[8]. As per decision taken in the previous meetings, the draft report listing the package of benefits given to the DPs of different categories by the government and the demands projected by the representatives of DPs were further discussed.

The fifth meeting was held on 17-08-2007[9] to consider the report prepared by a sub-committee in respect of compensation as well as deficiency of land.

The sixth meeting was held on 07-11-2007[10] wherein a threadbare discussion was held on the draft report prepared by the committee and it was decided that before the final report is submitted to the government, one week's time be given to representatives of the various groups/organizations of DPs to submit their suggestions for additions or alterations to the draft report. The seventh meeting of

the committee was held on 21-11-2007[11] to further discuss the draft report.

After discussing all details, the committee prepared a report in two parts. Part I of the report dealt with the details of the families etc and the benefits provided to them. Part II dealt with the demands and recommendations.

Part I dealt with the Displaced Persons (DPs) of 1947 from POK. It talked of 31,619 displaced families which were registered with the erstwhile Provincial Rehabilitation Organisation (PRO), which was disbanded by the State Government in 1982.

Part II dealt with the West Pakistan refugees, their problems and demands. However, the committee did not make any strong recommendations which could have mitigated the sufferings of these hapless Hindus who had to leave Pakistan due to communal clashes.

Recommendations/Suggestions

The committee discussed the "Citizenship rights to West Pakistani refugees as also their other allied demands". In its comments and recommendations, suggesting action to be taken, the committee said: West Pakistan refugees are very much citizens of India and there is no separate citizenship of the State. However, their demand is extension of Permanent Resident Certificate benefits to them in the State.

This demand is a political one and requires amendment of the State Constitution. Therefore, it is for the government to take a decision[12].

The committee also discussed the "Provision of separate funds for providing basic civic amenities (opening of Anganwadi centres etc in the areas of

habitation of West Pakistan refugees)". The committee accepted that the demand was genuine and deserved sympathetic consideration[13]. The West Pakistan refugees had also said that they should be extended the benefits of reserved categories such as SCs/STs/Social Castes/OBCs etc[14].

The committee recommended that since most of the DPs of 1947 from West Pakistan belonged to SC category, the government should issue separate circular instructions for granting to them reserved category certificates applicable only for recruitment to posts under the Central government or other State governments and para-military forces.

One of the subjects that the committee discussed pertained to special package for the rehabilitation of the DPs of West Pakistan. The issues that were discussed included the extension of Centrally Sponsored Schemes so that the same could be made applicable to the bastis (habitations) inhabited by the DPs of West Pakistan. The application of these schemes would have led to the grant of scholarships etc. to the wards of the DPs. Commenting on these issues, the committee said that these demands were indeed genuine and the government should consider them.

The committee also discussed the issue of identity cards for the West Pakistan refugees. These cards were meant to be prepared on the analogy of the Kashmir migrants for disbursing any type of relief, etc. The committee merely commented that the issuance of such cards should be considered.

Another subject that the committee discussed talked of the West Pakistan refugees living on

custodial lands who are prohibited by the government from repairing their houses or make new constructions. Incidentally, these DPs also pay rents. In its recommendation on the issue, the Wadhwa committee said that the Evacuees Property department should consider and allow the West Pakistani refugees to repair their houses as per norms and rules of the department.

Another point discussed by the Wadhwa committee was extending benefits of Indira Awas Yojana (IAY)/ Below Poverty Line (BPL) benefits to the West Pakistan refugees. The committee recommended the matter should be taken up by the Divisional Commissioner of Jammu with the Rural Development Department through the Revenue Department for extending the benefits of IAY/BPL to the West Pakistan refugees[15].

The Wadhwa committee also discussed the vital point of issuance of Domicile certificates to these DPs. In its recommendations, it said that Deputy Commissioners will be directed to issue the domicile certificates in favour of West Pakistani refugees of 1947 after fulfilling the procedural formalities.

The ninth and last point discussed by the Wadhwa committee was the issue of Special Package for West Pakistani refugees on the analogy of package sanctioned by the Government of India (GOI) for the DPs of 1947 as per the latest member of the family. On this point, the Wadhwa committee said that PRO, Jammu, will formulate a package for West Pakistani refugees and take up the matter with the Central Government through the Administrative Department[16].

It is amazing that some human rights organizations which often talk very energetically about the alleged human rights violations by security forces in Jammu and Kashmir have failed to take up the genuine cause of these hapless Hindus in any manner whatsoever. The citizenship rights of thousands of unfortunate Hindus who came from West Pakistan areas and settled in Jammu and Kashmir during 1947 are in a shambles but the so-called human rights champions never talked about them. These families were victims of the communal orgy that engulfed several areas of the sub-continent then and young children, widows and old all rushed towards the nearby Hindu-dominated areas to save their lives.

Save their lives they did, even as many of them perished as well when they were butchered by the communal forces. These people settled in parts of Jammu and Kashmir contiguous to West Pakistan areas in a haphazard manner. In a majority of cases, they settled on lands lying fallow along the borders and eked out a living by tilling the land.

Reasons for Migration

One pertinent point that must be taken into account is that these people did not leave their original places of habitations, where they had lived for generations, of their own free will. They were victims of violent events that created Pakistan with the departure of the British. According to official records, more than 1.5 crore (15 million) people (Hindus, Sikhs and Muslims) had to flee their homes as a communal frenzy led to dance of death (with non-Muslims killing Muslims and vice versa) in undivided Punjab, some

parts of which remained with India and the larger portion becoming part of the new nation of Pakistan. They moved from areas which went to Pakistan and since parts of Jammu and Kashmir, which had merged with India on October 26, 1947, were the closest Indian territories, they just moved in there. It was the Indian government of the day (in 1947) which encouraged them to settle near border with Pakistan.

These people, in very large numbers, were asked to take up cultivation of lands vacated by Muslims who had moved in the opposite direction, from territories of Jammu and Kashmir which acceded to India, towards Pakistan. They were deliberately settled near the borders so that the borders did not remain uninhabited as that would have been a far bigger headache for the Indian government.

Tactically also, these people, who had moved in from the West Pakistan territories, did not have any love lost for Pakistan. They proved to be invaluable assets for security forces and intelligence agencies as these displaced people would not easily condone infiltration by anti-India trouble-mongers from Pakistan territory.

These displaced people settled in vacant patches along the border in Kathua, Jammu and Rajouri districts because the Indian government encouraged them to do so. They placed their faith in the fairness of the Indian government hoping since they had been granted Indian citizenship; they will be safe and rehabilitated properly as had happened across other parts of the country.

The people from West Pakistan areas were settled by the Indian government in Terai belt of Uttar

Pradesh (and parts of Uttarakhand, a state carved out of UP) and elsewhere. This is the reason why Sikh refugee families, original inhabitants of West Pakistan areas, are settled in Tanakpur, Udham Singh Nagar and several other places.

These displaced people had chosen India as their country of refuge, of which J&K was a part, after accession. Refugees from West Pakistan settled in Delhi, Sonepat, Panipat, Ambala and other towns across the country were integrated in the societies they moved into and got all civil and citizenship rights. Therefore, it was not wrong for the refugees from West Pakistan who moved into J&K to expect that the Indian government will look after them and treat them on a par with refugees settled elsewhere. They know now how the Indian government left them in a lurch by letting the J&K government to decide the issues pertaining to their rehabilitation and citizenship rights.

A section of these refugees claim that at one time, during the India-Pakistan hostilities in 1947-48, they planned to move to Punjab, where the refugees from West Pakistan were being settled in large numbers. Groups of refugees also started moving from some of the border belts where they had initially settled in, to Punjab plains where the situation had stabilized. The reason and justification for trying to move to Punjab was that the Indian government headed by Pandit Jawaharlal Nehru was focusing on proper rehabilitation of the refugees in those parts. Some refugee leaders, including activist Labba (Labha) Ram Gandhi, claim that when they started moving on the Lakhanpur route towards Punjab, in small groups they

were persuaded by none other than Nehru and Sheikh Mohammed Abdullah to stay put.

These refugee leaders claim that they were assured by Nehru and Sheikh that they will get all rights guaranteed to refugees elsewhere in India, in Jammu and Kashmir as well. These representatives of the refugees argue that Nehru and Sheikh should have allowed them to go to Punjab and to other parts of India where they could have settled properly. For their sorry plight, they squarely blame Nehru and Sheikh saying the duo failed to protect their rights and proved to be utterly lacking in vision and concern. It was because of the policies pursued by Nehru and Sheikh that these refugees were persuaded to stay back in Jammu and Kashmir and here they are now, 65 years later, without any rights of citizenship of J&K, according to Bachan Lal Kalgotra, Senior Counsel, Jammu and Kashmir High Court, who had filed a case pertaining to the rights of these people in the Supreme Court in 1982 and the verdict of which was delivered on February 20, 1987[17].

It bears mention here that Dr Manmohan Singh, a Sikh refugee from Pakistan, became Prime Minister of the United Progressive Alliance (UPA) government formed in Delhi in the year 2004. He completed five years in office as Prime Minister of India in 2009. After the Lok Sabha elections that year, he got the post of the top executive of the country for a second term. He could reach the zenith of his career, earlier in his professional life, and later in the political domain, only because he was not treated as a second class, third rate citizen in Punjab where he settled, unlike the treatment meted out to the refugees from Pakistan who settled in

Jammu and Kashmir, courtesy Article 370 of the Constitution of India.

Earlier too, a Hindu refugee from Pakistan, Inder Kumar Gujral, remained the Prime Minister of India. Both in the Lok Sabha and the Rajya Sabha, there have been (and still are) several Members of Parliament, who had been refugees after the 1947 Partition. The refugees settled in Jammu and Kashmir, in contrast, cannot even fight Panchayat elections at the grassroots since they are not state subjects and don't have Permanent Resident Certificates (PRCs).

Different political parties, one and all, make promises to these people, particularly during Lok Sabha elections, that unresolved issues pertaining to their citizenship rights will be addressed. However, once the elections are over, these people are pushed to the margins, conveniently forgotten as their issues remain unresolved and unattended.

Disabilities Suffered

We may now discuss as to how Article 370 militates impinges on rights of these unfortunate refugees who had to come to India in 1947. Most of the constitutional provisions do not apply to the State of Jammu and Kashmir by their own force. Their application to the State of Jammu and Kashmir depends upon the President, who is empowered to apply them with such exceptions and modifications as he may, by order, specify. The only constitutional provisions, which have application by their own force, are Articles 1 and 370 of the Constitution of India.

The Constitution (Application to Jammu and Kashmir) Order, 1954, made by the President in

exercise of the power conferred by Clause (1) of Article 370, Constitution of India, extended the provisions of the Constitution of India, including Part-II (with certain exceptions and modifications) to the State of Jammu and Kashmir with retrospective effect from January 26, 1950. These modifications relevant for our discussions are that a further proviso has been added to Article 7 and a new Article, namely, Article 35-A, has been inserted. The further proviso to Article 7 is as follows:

"Provided further that nothing in this Article shall apply to a permanent resident of the State of Jammu and Kashmir, who, after having so migrated to Pakistan, returns to the territory of that State, under a permit for re-settlement in that State, or permanent return issued by or under the authority of any law made by the Legislature of that State, and every such person shall be deemed to be a citizen of India."

Article 35-A provides:

"35-A. Saving of laws with respect to permanent residents and their rights:

Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir and no law hereafter enacted by the Legislature of the State –

(a) *defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or*

(b) *conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects –*

(i) employment under the State Government;

(ii) acquisition of immovable property in the State;

(iii) settlement in the State; or

(iv) right to scholarships and such other forms of aid as the State Government may provide,

shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on other citizens of India by any provisions of this part."

Part-II of the Constitution with the above modification in Article 7 has been extended to the State of Jammu and Kashmir with retrospective effect from January 26, 1950.

The Constituent Assembly of the State of Jammu and Kashmir made provisions relating to "permanent residents" by inserting Sections 5-A to 5-F in the Jammu and Kashmir Constitution Act, 1956.

The Jammu and Kashmir Constitution Act, 1956, was repealed by the Constitution of Jammu and Kashmir. This Constitution was adopted by the Constituent Assembly of Jammu and Kashmir on November 17, 1956. Sections 1, 2 to 8 and 158 came into force on the date of the adoption of the Constitution and the remaining sections on January 26, 1957.

Article 35-A and the restrictive manner in which it is interpreted within J&K is at the root of all the problems faced by people like West Pakistan refugees settled in Jammu and Kashmir, women of the state,

ordinary Indian citizens or Indian companies. Its restrictive interpretation creates insurmountable hurdles and has disempowered the women of the state. This subject is dealt with in a more detailed manner, in a separate chapter, where we have also given details regarding Part-III of the Constitution of Jammu and Kashmir, consisting of Sections 6 to 10 which deals with permanent residents of the State.

A permanent resident or the State Subject having a Permanent Resident Certificate (PRC) enjoys certain special rights and privileges. These rights and privileges conferred on him offer him a protection that automatically bars non-permanent residents, residents living in the State but not having a PRC, from competing with the holders of the PRCs. Those having PRCs can get services in State cadre while non-PRCs are barred from this employment. Of course, the PRC holders, being Indian citizens, can compete with non-PRCs for employment in the Central government.

Those holding PRCs vote in the Lok Sabha elections as also the elections for the State Legislative Assembly, local bodies etc. However, residents who don't have PRCs can vote only in the Lok Sabha elections but not participate in the State Legislature elections as also in Panchayat or urban local body (ULB) elections. The enabling provisions made in favour of the PRC holders operate in a manner that they prove to be disabling for non-PRC residents.

For the purpose of elucidation and clarity, we can say this in another manner. A PRC holder, in his capacity as Indian citizens, can become the Prime Minister of India, President or Vice-President of India, Attorney General of India or Governor or Chief

Minister of any other State within India. However, anyone who does not have PRC cannot become even Panchayat member, corporator in Municipal Corporation or member of the Legislative Assembly of Jammu and Kashmir.

The question of a non-PRC Indian citizen becoming the Chief Minister of Jammu and Kashmir or acquiring any other important position just does not arise.

During Ghulam Nabi Azad's chief ministership (November 2, 2005 to July 7, 2008), the issue of granting permanent resident status to the West Pakistan refugees was discussed threadbare at an all-party meeting convened on July 30, 2007. During this meeting, even those political parties of the State, which do not have any legislator(s) in the State Legislature, were represented.

The excerpts from the deliberations of this meeting are being reproduced only to the extent to which they are relevant to our discussion pertaining to the issue in focus here. The meeting discussed other issues as well, but the views expressed by the participants on those subjects have been left out. In the paragraphs that follow, the views expressed by different political leaders on the issues pertaining to West Pakistan refugees have been given. We have also discussed as to who all participated and what was the agenda of the meeting presided over by then Chief Minister Ghulam Nabi Azad himself.

GOVERNMENT OF JAMMU AND KASHMIR, CIVIL SECRETARIAT, LAW DEPARTMENT

Subject: Minutes of the Meeting of all recognized political parties of the State held under the Chairmanship of Hon'ble Chief Minister ***(read Ghulam Nabi Azad)*** on 12th May 2007.

Present:-

1. Pandit Mangat Ram Sharma, Hon'ble Minister (Indian National Congress).
2. Shri Abdul Aziz Zargar, Hon'ble Minister (Peoples Democratic Party)
3. Shri Hakim Mohammed Yaseen, Hon'ble Minister (Peoples Democratic Front)
4. Peerzada Mohammed Sayeed, Hon'ble Minister (President Jammu and Kashmir Pradesh Congress Committee)
5. Shri Nawang Rigzin Jora, Hon'ble Minister (Representative of Leh)
6. Haji Nissar Ali, Hon'ble Minister (Representative of Kargil)
7. Shir Tariq Hameed Qarra, Hon'ble Minister for Law and Parliamentary Affairs (PDP)
8. Shri Abdul Rahim Rather, Hon'ble Leader of Opposition (National Conference)
9. Shri M.Y. Tarigami, Hon'ble MLA, Communist Party of India (Marxist)
10. Prof. Bhim Singh, Hon'ble MLC, (Jammu and Kashmir National Panthers Party)
11. Shri Harsh Dev Singh, Hon'ble MLA (Jammu and Kashmir National Panthers Party)
12. Shri Ashok Khajuria, State President, Bharatiya Janata Party

13. Shri Ashwani Kumar, Hon'ble MLA (Jammu Mukti Morcha)
14. Shri Jugal Kishore, Hon'ble MLA (BJP)
15. Abdul Rehman Takroo, (Communist Party of India)
16. Dr Yash Paul Bhagat, State President Bahujan Samaj Party

Officers:-

1. Chief Secretary
2. Principal Secretary to Hon'ble Chief Minister
3. Commissioner/Secretary to Government, Law Department
4. Secretary to Government, Revenue Department

The following three issues were discussed in the meeting:-

1. Delimitation

(a) With regard to increase of seats by 25% in the Legislative Assembly

(b) Normal delimitation - redrawing of boundaries and rotation of reserved constituencies.

2. Demand for granting of PRC ***(read Permanent Resident Certificate)*** rights to the refugees of 1947;

3. The issues pertaining to the refugees of 1965 and 1971

For the purpose of this study, only the discussion pertaining to the second demand is relevant. Accordingly, this is being reproduced, verbatim.

Item No. 2

Demand for granting permanent resident status to the West Pakistan refugees of 1947:

There was no consensus among political parties on the issue of granting Permanent Resident status

to the West Pakistan Refugees of 1947 as majority of participants were of the opinion that this being a constitutional issue needed further deliberations and a final view could not be taken in isolation at this stage.

Bharatiya Janata Party (BJP), through the paper presented by it, stated that the Party was for a decision that entitles the refugees from West Pakistan to all the rights, without any exception, which were available to the permanent residents of the State.

Bahujan Samaj Party, through its paper presented in the meeting, stated that West Pakistan refugees of 1947 be granted PRC rights, citizenship rights and be rehabilitated like other refugees of 1947 with a special package for jobs to bring them at par with other people of J&K State.

Prof. Bhim Singh (Jammu and Kashmir National Panthers Party) stated that the West Pakistan refugees who settled in J&K State were living in a miserable condition as they were being denied the basis rights and amenities enjoyed by other people living in the State while those refugees who settled in other parts of the Country were enjoying all rights and facilities as were being enjoyed by other citizens of the Country. He stated that his Party stood for granting of permanent resident status to these refugees so that they get the right to vote in State Assembly elections and right to appointment in Government jobs in the State.

Shri Ashwani Kumar, MLA representing **Jammu Mukti Morcha (JMM)**, supported the grant of permanent resident status to the West

Pakistan refugees as the refugees settled in other parts of the Country were entitled to all the rights and amenities as are being enjoyed by other citizens of the Country.

Peoples Democratic Party (PDP), through the paper presented by **Shri Abdul Aziz Zargar**, expressed the view that the sensitivities reflected by the founding fathers of the State Constitution five decades back about permanent resident issue have, with the passage of time, only become sharper rather than diluted. Shri Zargar also stated that it is impossible for the PDP to endorse anything that perpetuates the miseries of any section of people who are living in the State. The issue of permanent resident status to West Pakistan refugees could not be isolated from the overall situation and the resolution process. Since at this time, stakes are so high and the hopes from all the regions are pinned on the peace process, other issues like the one cane wait for their turn. The PDP accordingly proposed that the issue of granting permanent resident rights to the West Pakistan refugees of 1947 be considered with a solution to the larger problem reached between the concerned parties, including India, Pakistan and the people of J&K.

Abdul Rahim Rather, National Conference (NC), stated that the issue of granting permanent resident status to West Pakistan refugees cannot even be considered when we have not been able to bring in force the Grant of Permit for Re-settlement in (of Permanent Return to) the State Act, 1982. Mr Rather said that Section 6 (2) of the State Constitution and Article 7 of the Constitution of

India, as applicable to J&K, empower the State Legislature to make a law for allowing those permanent residents of the State who have migrated after March 1947 to the territory now included in Pakistan to return to the State under a permit for settlement in the State of J&K or permanent return issued by or under the authority of such law and every such person shall be deemed to be a citizen of India. The State Legislature accordingly passed the aforementioned legislation to this effect. Unfortunately, a section of people from Jammu Division raised unnecessary hue and cry with the result that the said Act was subjected to Presidential reference. Till date, the matter has been kept pending. In case those who are permanent residents of this State are not allowed to return in accordance with the law permitted by the Constitution, how can we grant permanent resident status to those who do not belong to the State and have migrated from West Pakistan. Such a step, if taken, will further alienate the people who are feeling discriminated and deprived of exercising their Constitutional rights and powers. Mr. Rather said that NC stands for a comprehensive resolution of all pending issues keeping in view the sensitivities of all sections of people and all regions of the State. The issue of West Pakistan refugees cannot, therefore, be considered in isolation.

Mr. M.Y. Tarigami, of the Communist Party of India (Marxist), opposed the grant of permanent resident status to the West Pakistan refugees. He said the Government should address the concerns and interests of all sections of the society. A large

number of people, particularly of the Valley are already feeling alienated and deprived. These sections of society feel that the demand of permanent resident status to West Pakistan refugees raised by a marginal section belonging to a particular region is made only to create hurdles in the peace process and is a ploy to change the demography of the State. Mr Tarigami said that at this crucial juncture, when the peace process was underway, the Government should not do anything that impeded or prejudiced the said process. Such things cannot be forced on the people. There has to be a public consensus on such controversial issues and the views of all regions of the State have to be taken into consideration. He appealed to all the participants not to vitiate the atmosphere of peace and reconciliation by raising controversial issues like grant of permanent resident status to the refugees as it shall be counter-productive.

Mr Abdul Rehman Trakroo, Communist Party of India, also opposed the grant of permanent resident status to West Pakistan refugees on the ground that such a step will further alienate the people and would be detrimental to the ongoing peace process. He said that once the Kashmir issue was resolved amicably, this issue would automatically get resolved.

Pandit Mangat Ram Sharma, Congress, said that the problem of refugees is a human problem and requires a human approach. He said that this issue was pending since independence and the stand of the Central Government has always been that this issue can be resolved only by the State Government

and the Central Government cannot force a decision in the matter. He said that all political parties of the State should address this human issue with an open mind and without any pre-conceived notion. It was in this perspective that the present meeting had been convened to know the viewpoint of each political party in order to arrive at a consensual decision, he added. So far as Congress party is concerned, it supports grant of permanent resident status to these refugees but he said decision cannot be taken unless all political parties representing all regions of the State are in agreement.

Mr Rigzin Jora, independent MLA from Leh constituency and of Ladakh Union Territory Front (LUTF), said that this issue should be resolved by consensus an in case all political parties agree, the West Pakistan refugees should be granted permanent resident status.

Haji Nissar Ali, independent MLA from Kargil, said that the issue of grant of permanent resident status to West Pakistan refugees cannot be considered in isolation and this issue having been raised before the Working Groups constituted in pursuance of Prime Minister's Round Table Conference should be left to be resolved as part of peace process.

However, all political parties supported providing basic civic facilities and other social and development related amenities to these refugees, which is possible without amending any existing law or the Constitution of the State.

Unfortunately for the West Pakistan displaced persons, these words and high sounding promises

made by politicians of different hues have proved just that, empty words. Over five years down the line, by February 2013, nothing has been done to help these poor and destitute people, either by the State Government or by the Central government.

From time to time, the issues pertaining to West Pakistan refugees have been discussed at the highest level, both in the Jammu and Kashmir state government and in the Central government. There has been an exchange of surfeit of letters from the Central government ministers to different Chief Ministers of the State. Most of these letters have been from the Union Ministry of Home Affairs (MHA) and remain, largely unanswered.

In the following few pages, we have included several such letters and other documents of the MHA. Photocopies of these documents were procured from the 1947 West Pakistan Refugees Action Committee activists, officials of the Union MHA as also from Jammu and Kashmir state government officials.

Important Documents

Letter from Mr. L.K.Advani, Home Minister to Farooq Abdullah, Chief Minister of J & K

L.K. ADVANI
HOME MINISTER
D.O. No 15030/21/2001-K.H(1)
Dear Dr Abdullah Ji,

1. I am enclosing a copy of my D.O. letter of even No dated 31st August, 2001, requesting to grant State Subject Status to the 1947 West Pakistan refugees and give them identification papers and access similar to that which any State Subject of J&K would have, to

higher education, State Government services and to various other social welfare and poverty alleviation schemes pending granting of State Subject Status to them.

2. I am still awaiting a response in the matter from you. I would again request that the problems of these refugees may please be considered sympathetically and necessary steps taken to redress their grievances.

With regards,
Yours Sincerely,
(L.K. Advani)

Dr Farooq Abdullah,
Chief Minister,
Government of Jammu and Kashmir,
Jammu. [17]

Letter from Mr. L.K.Advani, Home Minister to Farooq Abdullah, Chief Minister of J & K

D.O. No 15030/18/2001-K.H (1)
31 AUG 2001

Dear Shri Farooq Abdullah Ji,

You will recall that in a letter of even No dated 6th December, 1999, I had requested you to resolve the problems of 1947 West Pakistan refugees settled in J&K and to ensure that these people or their children, who are recognized by the Constitution of India as citizens of India, should not be subjected to any hardship in the matter of education or employment within J&K.

Recently, a delegation of these hapless refugees met me and gave me an account of the difficulties they had been facing even after 53 years of their migration

to J&K. Since they have still not been granted the status of State Subjects, they continue to suffer from the following major disabilities:

(a) While they are entitled to exercise their franchise for elections to the Lok Sabha, they cannot vote for the elections to the State Assembly and Local Bodies.

(b) They cannot mortgage the land in their possession for raising loans.

(c) Their children do not get admission to higher educational/professional institutions and are denied jobs in State Government services.

I need not emphasize that unless the West Pakistan refugees settled in J&K are granted State Subject Status by an appropriate amendment in the J&K Constitution, they will continue to be neglected and discriminated against in the matter of education and employment. While there may not be any legal bar on admission of their children in colleges and professional institutions, the fact remains that these families have not been able to avail of the higher education facilities in the State and are extremely backward from educational and economic point of view. A sense of total helplessness seems to have gripped this community and they see not future for their present and coming generations.

I would, therefore, request you to consider the problems of West Pakistan refugees to the State of J&K sympathetically and take necessary steps to grant State Subject Status to them to end their disenfranchisement as well as disability as regards entry into institutions of higher education and State Government services. If, for any reason, it is not immediately possible to grant State Subject Status to

these people, a survey of these families may be conducted based on which they be given identification papers and access, as any state subject of J&K would have, to higher education, State Government services and to various other social welfare and poverty alleviation schemes.

I would appreciate if you could personally apprise me about the action taken in the matter.

With regards,
Yours Sincerely,
Sd./
(L.K. Advani)

Shri Farooq Abdullah,
Chief Minister, Government of Jammu and Kashmir, Srinagar

Letter from The Shivraj Patil, Home Minister to Mufti Mohammed Sayeed, Chief Minister of J & K

SHIVRAJ PATIL
HOME MINISTER, INDIA
8th January, 2005

Dear Shri Sayeed,

As you are aware, the West Pakistani refugees of 1947, who chose to settle in the State of J&K, have not been granted the State Subject Status in J&K. As a result of this policy, these refugees face several disadvantages viz:

(a) While they are entitled to exercise franchise for Parliamentary elections, they cannot vote for

the elections to the State Assembly and Local Bodies.

(b) They cannot mortgage the land in their possession for raising loans.

(c) Their children are not entitled to admission in professional institutions/recruitment in State Government services.

(d) The Scheduled Castes among these refugees cannot avail of the reservation policy for recruitment to State Government services since they do not have the status of permanent residents of the State.

In order to alleviate the problems faced by the West Pakistan Refugees, the State is required to legislate under Section 8 of the J&K Constitution for according the State Subject Status to them. Considering the fact that these refugees have been residents of the State of J&K since the last 56 years, it is only befitting that they should be granted this status without any further delay. I shall be grateful if your Government considers the matter proactively.

With regards,
Yours Sincerely,
(Sd./-)
SHIVRAJ V. PATIL

Shri Mufti Mohammed Sayeed,
Chief Minister, Government of Jammu and Kashmir, SRINAGAR.

Letter from Dr. Farooq Abdullah, to Mr. P. Chidambaram, Home Minister

DR. FAROOQ ABDULLAH
MINISTER, NEW AND RENEWABLE ENERGY
GOVERNMENT OF INDIA

July 21, 2009

Dear Shri Chidambaram,

A delegation of West Pakistani Refugees Action Committee 1947 met me in my office and represented about the various difficulties being faced by them. One of the issues raised by them was regarding the problem they faced while seeking recruitment to various para-military forces (CPMFs). They alleged that despite an unambiguous order (copy enclosed) issued by MHA to the DGs of various CPMFs exempting the West Pakistani Refugees from the condition of presenting a domicile certificate for recruitment, they are still being asked to produce domicile certificates.

I shall be grateful if you could get this matter looked into and issue proper instructions to various CPMFs so that the MHA instructions be honoured and the difficulties of West Pakistani refugees of 1947 be alleviated.

With regards
Yours Sincerely,
Sd./-
(Farooq Abdullah)

Shri P Chidambaram,
Hon'ble Minister for Home Affairs
Government of India
North Block, New Delhi-110001

Copy for information to:
Shri Labha Ram Gandhi, President, West Pakistani Refugees Action Committee, Swanka Morh (Vijaypur), Tehsil Samba (Jammu), Jammu & Kashmir

(Rohit Kansal)
PS to Minister

Letter from Sri Prakash Jaiswal, MOS Homes to Shri Avinash Raj Khanna, BJP (M.P.)

SRIPRAKASH JAISWAL
MINISTER OF STATE
MINISTRY OF HOME AFFAIRS
NORTH BLOCK, NEW DELHI-110001
D.O. NO 15030/34/2005-K.V.

January 6, 2006

My dear Khanna Ji,

Please refer to the matter raised by you under Rule 377 in the Lok Sabha on 28.11.2005 regarding the need to provide voting rights to the people from Pakistan, who settled in Jammu (J&K) after partition in 1947. This also has reference to your letter dated 5.12.2005 addressed to the Hon'ble Home Minister.

2. In this connection, I would like to inform you that the displaced persons from Pakistan who chose to settle in Jammu and Kashmir after the Partition are Citizens of India and, as such, can vote in the elections to the Lok Sabha. However, they have not been granted State Subject status by the State Government of Jammu and Kashmir, which would enable them to vote in the State Assembly elections and have other benefits as allowed to State Subjects. The Government

of India have taken up the matter with the State Government of Jammu and Kashmir from time to time. So far, the State Government have not shown any inclination towards declaring these displaced persons as State Subjects.

3. A Writ Petition (No 7698 of 1982) was also filed in the Supreme Court regarding granting of State Subject Status to the West Pakistani Refugees. The Court in its judgment on 20.2.1982 did not provide any relief in this regard as there was no provision in the Jammu and Kashmir Constitution to this effect. The Court further observed that it is up to the State Legislature to make suitable amendments to the State laws to provide relief to these persons.

Thanking you

Yours sincerely
Sd. /-
(SRIPRAKASH JAISWAL)
Shri Avinash Rai Khanna
Member of Parliament (Lok Sabha)
56, South Avenue,
New Delhi-110011

Supreme Court Judgment on West Pakistan Refugees

(1987) 2 Supreme Court Cases 223

(BEFORE O CHINNAPPA REDDY AND S. NATARAJAN, JJ.)

BACHAN LAL KALGOTRA

Petitioner

Versus

STATE OF JAMMU AND KASHMIR \
AND OTHERS

Respondents

Writ Petition (Civil) No 7698 of 1982,
Decided on February 20, 1987

Constitution of India – Article 35-A [as introduced by Constitution (Application to J&K) Order, 1954] – Migrants from West Pakistan to J&K in 1947, who are not 'permanent residents' within the meaning of Section 6 of the J&K Constitution still not entitled to rights available to the permanent residents of J&K – In view of Article 35-A, provisions of Section 12 (b) of J&K Representation of the People Act, Section 8 (a) of Village Panchayat Act, Section 4 of Land Alienation Act, 1995 Bk. And Rule 17(a) of J&K Civil Services (CCA) Rules denying equal rights to such migrants not open to challenge on ground of inconsistency with Part III of the Constitution of India though they are domiciled in State of J&K for 40 years – Hence despite their anomalous position, Court cannot grant any relief to them – State legislature advised to amend the concerned legislations.

Writ petition dismissed.

R-M/7809/C

Advocates who appeared in this case:

M.S. Ganesh, Advocate (amicus curiae) for the Petitioner;

K. Parasaran, Attorney-General. Altaf Ahmed, Advocate-General (S.K. Bhattacharya, Ms A. Subashini and H.C. Paonam, Advocates, with them), for the respondents.

The order of the Court was delivered by

CHINNAPPA REDDY, J. – The petitioner is the Chairman of the Action Committee of West Pakistan Refugees. He migrated from West Pakistan to the State of Jammu and Kashmir in India in 1947 in the wake of the partition of the country. He claims to speak on behalf of the refugees from West Pakistan who migrated and settled in the State of Jammu and Kashmir. He contends that notwithstanding the fact that it is almost four decades since they migrated and settled down in the State of Jammu and Kashmir, they are denied many basic rights which other Indian citizens have in other parts of the country, such as, the right to acquire any immovable property in the State, the right to employment under the State, the right to start an industry, the right to purchase transport vehicles, the right to higher technical education, the right to be elected to the State Assembly or a local body, etc. He complains that while refugees from West Pakistan who migrated into the State of Jammu and Kashmir in 1947 and have settled down in the State are denied these rights, recently the Jammu and Kashmir legislature has enacted the Resettlement Act, 1982, by which these rights are given to erstwhile residents of Jammu & Kashmir who had voluntarily migrated to West Pakistan at the time of the partition of the country in 1947 and their children, who may now

choose to return to Jammu & Kashmir. The present writ petition was initially filed challenging the vires of the Resettlement Act, 1982. The vires of the Act is already awaiting the decision of this Court in Special Reference No. 1 of 1982. For the purposes of this petition, he now proceeds on the basis that the Act is valid but claims that he and other persons situated like him should at least be given the same rights as are given to those who voluntarily migrated to West Pakistan at the time of the partition in 1947.

2. It is true that the persons in the position of the petitioner who migrated from West Pakistan to the State of Jammu & Kashmir in the wake of 1947 partition and have settled down in the State of Jammu and Kashmir and who are citizens of India and who also have the right to participate in elections to Parliament, have very anomalous rights within the State. For example, they are not entitled to be included in the electoral roll of the State Assembly, they are not entitled to be elected to a village Panchayat, they are not entitled to purchase any land and they are also not entitled to be appointed to any service under the State Government. All these denials and deprivations are the consequence of the definition of a 'permanent resident' under Section 6 of the Jammu and Kashmir Constitution. Section 6 is as follows:

Permanent Residents: - (1) Every person who is, or is deemed to be, a citizen of India under the provisions of the Constitution of India shall be a permanent resident of the State, if on the fourteenth day of May, 1954–

(a) he was a State Subject of Class I or of Class II; or

(b) having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than ten years prior to that date.

(2) Any person who, before the fourteenth day of May, 1954, was a State Subject of Class I or of Class II and who having migrated after the first day of March, 1947, to the territory now included in Pakistan, returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority of law made by the State Legislature shall on such return be a permanent resident of the State.

(3) In this section, the expression, "State Subjects of Class I or of Class II" shall have the same meaning as in State Notification No. 1-L/84 dated the twentieth April, 1927, read with State Notification No. 13/L dated the twenty-seventh June, 1932.

The 1927 Notification defining State Subject is as follows:

The terms State Subject means and includes–

Class I. – All persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Gulab Singh Sahib Bahadur, and also persons who settled therein before the commencement of Samvat year 1942, and have since been permanently residing therein.

Class II. – All persons other than those belonging to Class I who settled within the State before the close of Samvat year 1968, and have since permanently resided and acquired immovable property therein.

Class III. – All persons, other than those belonging to Class I and II permanently residing within the State, who have acquired under a rayatnama any immovable property therein or who may hereafter acquire such property under an ijazatnama and may execute a rayatnama after ten years continuous residence therein.

Class IV. – Companies which have been registered as such within the State and which, being companies in which the government are financially interested or as to the economic benefit to the State or to the financial stability of which the government are satisfied, have by a special order of His Highness been declared to be State Subjects.

Note I. – In matters of grants of the State scholarships, State lands for agricultural and house building purposes and recruitment to the State service, State subjects of Class I should receive preference over other classes and those of Class II, over Class III, subject, however, to the Order dated January 31, 1927, of His Highness the Maharaja Bahadur regarding employment of hereditary State subjects in government service.

Note II. – The descendants of the persons who have secured the status of any class of the State subjects will be entitled to become the State subjects of the same class. For example, if *A* is declared a State subject of Class II, his sons and grandsons will ipso facto acquire the status of the same class (II) and not Class I.

Note III. – The wife or widow of a State subject of any class shall acquire the status of her husband as State subject of the same class as her

husband, so long as she resides in the State and does not leave the State for permanent residence outside the State.

Note IV. – For the purposes of the interpretation of the term `State subject' either with reference to any law for the time being in force or otherwise, the definition given in this notification as amended up to date shall be read as if such amended definition existed in this notification as originally issued.

3. There is no dispute that the petitioner and others like him are not 'permanent residents' of Jammu and Kashmir within the meaning of Section 6 of the Jammu and Kashmir Constitution. Section 6 of the Jammu and Kashmir Constitution because they are not permanent residents as defines it, they do not have the rights and privileges mentioned earlier. Section 12 (b) of the Jammu and Kashmir Representation of People Act provides that a person shall be disqualified for registration in an electoral roll if he is not a permanent resident of the State as defined in Part III of the Constitution, Section 8 (a) of the Village Panchayat Act provides that a person shall be disqualified for being chosen as or for being a member of a Panchayat if he is not a permanent resident of the State, Section 4 of the Land Alienation Act, 1995 Bk. Provides that transfer of land in favour of any person who is not a State subject is prohibited and Rule 17 (a) of the Jammu and Kashmir Civil Services, Classification of Control and Appeal Rules provides that no person shall be eligible for appointment to any service by direct recruitment unless he is a hereditary State subject to be known hereafter as a permanent resident.

It is to be noticed here that these provisions are not open to challenge as inconsistent with the rights guaranteed by Part III of the Constitution of India because of "the Constitution (Application to Jammu and Kashmir) Order 1954" issued by the President of India under Article 370 (1) (d) of the Constitution by which Article 35-A was added to the Constitution in relation to the State of Jammu and Kashmir. This article states:

> 35-A. Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the legislature of the State –
>
> 3. defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or
> 4. conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects –
>
> (i) employment under the State Government;
> (ii) acquisition of immovable property in the State;
> (iii) settlement in the State; or
> (iv) right to scholarships and such other forms of aid as the State Government may provide, shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provisions of this Part.

The net result is that persons in the position of the petitioner, though citizens of India and entitled to the various Fundamental Rights guaranteed by the Constitution, are not in a position to enjoy many of those rights within the State of Jammu and Kashmir

through they are domiciled in that State for nearly 40 years.

4. In the other hand, those who have migrated to the West Pakistan in 1947 and who may choose to return to the State of Jammu and Kashmir now, appear to stand in a better position. But that is apparently because of the special position secured to them in the Jammu and Kashmir Constitution itself. Section 6(2) of the Jammu and Kashmir Constitution which has already been extracted by us, expressly provides that such persons if they were previously State subjects of Class I and Class II shall be permanent residents of the State on their return to the State of Jammu & Kashmir from West Pakistan under a permit for re-settlement in the State or for permanent return issued by or under the authority of law made by the State legislature. It is pursuant to this provision that the Resettlement Act has been enacted.

5. In the circumstances, in view of the peculiar constitutional position obtaining in the State of Jammu and Kashmir, we do not see what possible relief we can give to the petitioner and those situated like him. All that we can say is that the position of the petitioner and those like him is anomalous and it is up to the legislature of the State of Jammu & Kashmir to take action to amend legislations, such as, the Jammu & Kashmir Representation of the People Act, the Land Alienation Act, the Village Panchayat Act, etc. so as to make persons like the petitioner who have migrated from West Pakistan in 1947 and who have settled down in the State of Jammu & Kashmir since then, eligible to be included in the electoral roll, to acquire land, to be elected to the Panchayats, etc. etc. This can

be done by suitably amending the legislations without having to amend the Jammu & Kashmir Constitution. In regard to providing employment opportunities under the State Government, it can be done by the government by amending the Jammu & Kashmir Civil Services, Classification and Control and Appeal Rules. In regard to admission to higher technical educational institutions also, the government may make these persons eligible by issuing appropriate executive directions without even having to introduce any legislation. The petitioners have a justifiable grievance. We are told that they constitute nearly seven to eight per cent of the population of the State of Jammu and Kashmir. Surely they are entitled to expect to be protected by the State of Jammu and Kashmir. In the peculiar context of the State of Jammu and Kashmir, the Union of India also owes an obligation to make some provision for the advancement of the cultural, economic and educational rights of these persons. We do hope that the claims of the persons like the petitioner and others to exercise greater rights of citizenship will receive due consideration from the Union of India and the State of Jammu & Kashmir. We are, however, unable to give any relief to the petitioner.

MOST IMMEDIATE
PARLIAMENT MATTER

No. 15030/27/2000-K.II (1)
Government of India
Ministry of Home Affairs
Department of Jammu and Kashmir Affairs
(K.II Division)
***

North Block, New Delhi
Dated the 4th of May 2000

OFFICE MEMORANDUM

Subject: Notice of Short Duration Discussion under Rule 193 regarding 'pathetic conditions of the displaced persons from Pakistan who are inhabiting the State of Jammu and Kashmir since 1947'.

The undersigned is directed to refer to Lok Sabha Secretariat's U.O. No. 17/4(28)/2000/L-I dated 24.4.2000 on the subject noted above.

5. The facts in the matter are furnished as under:

At present approximately 30-35 thousand Pak refugee families of 1947 are reportedly staying mainly in areas ranging between Kathua and Palanwala on international border. As the land on the border was not inhabited, these refugees occupied the available land. The State Government, however, allowed them to be in possession of this land.

The demand for State Subject Status has been taken up with the Government of Jammu and Kashmir from time to time. Home Minister wrote a letter to the Chief Minister, J&K, on 6th December 1999 requesting to solve the problem stating that "these people who are recognized by the Constitution of India as Indian citizens should not be subject to handicaps in the

matter of education or employment only because they chose to migrated to J&K instead of the rest of India."

The main demand of these refugees is that they should be declared as Permanent Residents of the State of J&K. Their other specific demands are as under: -

* They should be given proprietary rights on the land including agricultural land in their occupation and their tenancy rights should be recognized i.e. land under the cultivation of the refugees should not be allowed to be sold by the owners.
* Refugees working as landless labourers should be allotted land at the rate of four acres per family and should also be allowed 10 marla plots for building houses.
* The refugees should have the right to sell and purchase property including land in the State and they should be given all the rights that are available to the local residents.
* Children of the refugees should be given employment in the State Government service. Free education should be extended to the children of the refugees who should also be given a share of the scholarships.
* Article 370 should be abrogated or else these refugees should be settled in Yamuna Nagar and Ganga Nagar districts of Uttar Pradesh and Rajasthan.

Most of the above demands are to be fulfilled by the State Government. But the State Government would not be able to provide any help to these refugees unless they are given the State Subject Status by suitably amending State Laws and the State Constitution. In fact, the legal position today is that it is the State and not the Union Government which can

decide about the issue of State Subject status. Existing laws regarding State Subject Status predate the Indian Constitution and are protected under Article 35A of the Indian Constitution.

Neither the State Government, nor State legislature of J&K have shown much inclination to consider giving State Subject Status to these refugees of 1947. In view of the fact that the West Pakistani refugees of 1947 are recognized by the Constitution of India as Indian citizens and, as such, they should not be subject to handicaps in the matter of education or employment only because they chose to migrate to J&K in 1947. Accordingly, the following Ministries/Departments have been requested to extend to these people the benefits of their schemes –

* Ministry of Industry has been requested to ask all public sector undertakings to give preference/priorities to these people at the time of recruitment being done by the public Sector organizations.

* Ministry of Rural Development has been requested to implement special centrally sponsored Rural Development Schemes like Integrated Water Shed Development including components of EAS, JRY, DWCRA, Integrated Child Development Scheme, etc. in the pockets where these refugees are residing so that the benefits of these schemes could accrue to them.

* Department of Economic Affairs has been requested to issue directions to all the banks and financial institutions operating in J&K to give priority in advancing loans to these people so that they can set up their own ventures or their economic activity.

* Ministry of Human Resource Development has been requested to establish special resident schools on the

lines of Navodaya Vidyalayas for the children of these displaced persons. Ministry of HRD has been requested to give preference or earmark special quota for higher education to the children of these refugees in colleges and universities.

Ministry of Defence has been requested to examine the feasibility of recruitment of children of these refugees in Defence Forces.

On the part of the Minister of Home Affairs, instructions have already been issued to Central Police Organization to recruit West Pakistani refugees of 1947 in Central Para-military Organization (CPO) without the condition of having a domicile certificate from the designated authority of the J&K State. However, other norms and rules related to recruitment are to be followed in such cases.

3. This ministry has no objection if the above information is provided the Hon'ble Minister.

4. This issues with the approval of Special Secretary (JKA).

Sd/-

(K.M. Kutty)

UNDER SECRETARY TO THE GOVERNEMNT OF INDIA,

TELE: 3015903

The Lok Sabha Secretariat (Shri O.P. Arora, U.S.)
(Legislative Branch-I)
Parliament House Annexe
NEW DELHI.

Union Ministry of Home Affairs (MHA) document

ANNEXURE

The West Pakistani Refugees have been struggling for better citizenship rights, educational rights for their children, credit facilities, issuance of Scheduled Caste, Scheduled Tribes and Other Backward Classes (CBC) certificates etc, since 1947. However, not much has changed for them. In the last quarter of year 2012, which was 65th year of the arrival of these refugees in Jammu and Kashmir, the Union Ministry of Home Affairs (MHA) discussed their various grievances and demands.

In a meeting held on October 11, 2012, the MHA was informed by J&K Government officials that it may consider recommendations made by the Honourable Supreme Court in a judgment delivered in 1987. We have reproduced the said judgment as an Annexure in the preceding pages. However, one sure can call it a travesty and a sad commentary on the way things are moving in J&K as far as proper rehabilitation of West Pakistani Refugees is concerned.

For the last 25 years, the recommendations or suggestions of the Supreme Court regarding these hapless Indian citizens caught in a time warp in J&K have remained in cold storage. There has been no forward movement on the redressal of their grievances and problems.

Incidentally, it bears mention here that militancy broke out in J&K in 1989-90. Hundreds of youths crossed over to Pakistan Occupied Kashmir (POK) and mainland Pakistan to get training in arms, infiltrated into J&K and created mayhem. These armed insurgents waged a war against India, killed its

citizens, not only in Jammu and Kashmir, but throughout the mainland India and even beyond.

Over two decades later, the State Government today has created a tailor-made rehabilitation policy for these people, referred to as "misguided youths" in the mainstream newspapers in Jammu and Kashmir. Elsewhere, Indian intelligence agencies and security agencies describe them as anti-national elements (ANEs), armed insurgents, rebels, militants and even terrorists.

On paper, these people are better placed than the West Pakistani Refugees who were forced by circumstances to rush to India in their hour of need, despite waging a war against India. They have more rights in J&K than West Pakistan Refugees, according to most representatives of the refugees.

Excerpts from the minutes of meeting of October 11, 2012, at the Union MHA are being reproduced herein under.

MINISTRY OF HOME AFFAIRS
(FFR DIVISION)

Minutes of the meeting Chaired by Shri Khurshid Ahmed Ganai, Additional Secretary (Foreigners), Ministry of Home Affairs on the 11th October, 2012, in his Chamber at North Block, New Delhi, to review the action taken to redress the grievances of West Pakistani Refugees settled in J&K and the implementation of relief package for Displaced Persons (DPs) from POK of 1947, 1965 and 1971.

Shri Khurshid Ahmed Ganai, Additional Secretary (Foreigners), chaired the meeting on the 11th October, 2012, in his Chamber in North Block, New

Delhi, to review the action taken to review the action taken to redress the grievances of West Pakistan Refugees settled in J&K and implementation of relief package for Displaced Persons (DPs) from POK of 1947, and internally displaced persons of 1965 and 1971. The list of participants is at Annexure.

2. Initiating the discussions, Additional Secretary (Foreigners), Ministry of Home Affairs, referred to the memorandum dated the 22nd of August, 2012, submitted to Hon'ble Prime Minister and Home Minister by Shri Saifuddin Soz, president, Jammu and Kashmir Pradesh Congress Committee, regarding problems faced by the West Pakistan Refugees settled in J&K and the Displaced Persons (DPs) from Pakistan Occupied Kashmir (POK) of 1947, 1965 and 1971 and the petition submitted by Shir Avinash Rai Khanna to the Rajya Sabha Secretariat regarding the problems faced by the West Pakistan Refugees settled in J&K. He mentioned that the memorandum submitted by Shri Soz and the petition of Shri Khanna had been sent to the State Government for action taken report on issues concerning them and for information/clarification sought for rehabilitation of West Pakistani Refugees and additional assistance for rehabilitation of Displaced Persons (DPs) from POK, the response from the State Government in the matter was still awaited.

Thereafter, AS(F) suggested that each of the demands of the West Pakistani Refugees and the status of implementation of relief package to the Displaced Persons from POK of 1947, 1965 and 1971 be taken up for discussion.

3. The grievance and demands of West Pakistani Refugees:

Shri R R Jha, Joint Secretary (FFR), Ministry of Home Affairs stated that the main grievances and demands of West Pakistan Refugees related to the following issues:

(i) Permanent Resident Rights for West Pakistani Refugees in the State of Jammu and Kashmir;
(ii) Right to contest in State elections;
(iii) Right to purchase property in Jammu and Kashmir;
(iv) Eligibility for recruitment to State Services;
(v) Issuance of Domicile Certificate to West Pakistani Refugees;
(vi) Issuance of SC/ST/OBC Certificates;\
(vii) Right to education in technical/professional institutes in the State;
(viii) Extension of benefits under Indira Awas Yojna (IAY) and those available to BPL families;
(ix) Extension of benefits under Centrally Sponsored Schemes;
(x) Extension of credit facilities by banks to West Pakistani Refugees without collateral security;
(xi) Special financial package for rehabilitation;

4. (i) In so far as conferment of Permanent Residents's rights on West Pakistani Refugees are concerned, JS (FFR), MHA, stated that this issue may require amendment to J&K Constitution. However, to enable the West Pakistani Refugees to contest the State elections, to purchase property in the State and for recruitment to State services/posts; the State Government may consider amending the relevant existing legislations notified by the State Government

in view of the judgment dated 20-2-1987 of the Honourable Supreme Court in the case of Shri Bachan Lal Kalgotra Vs. State of J&K and Others. The Secretary (Revenue), Government of J&K, stated that the grievances of West Pakistani Refugees regarding Permanent Resident rights, right to contest in State Elections, right to purchase property in J&K and recruitment to State services have been examined by the State Government and after obtaining legal opinion on these issues, the State Government has constituted a Cabinet Sub-Committee to consider the matter. He further stated that on receipt of the recommendations of the Cabinet Sub-Committee, a suitable decision for redressal of the grievances of West Pakistani Refugees on these four issues would be taken by the State Government.

(ii) On the issue of Domicile Certificate to West Pakistani Refugees, JS (FFR), MHA, stated that between 2008 and up to May 2012, Deputy Commissioners of Jammu, Samba and Kathua had issued Domicile Certificates to 1, 7 and 776 West Pakistani Refugees, respectively. AS (F) felt that the State Government may need to streamline the procedure for issue of Domicile Certificates to West Pakistani Refugees settled in J&K , to enable them to claim age relaxation for recruitment to Central government services/posts under the State of Jammu and Kashmir (Relaxation of Upper Age Limit for Recruitment to Central Civil Services and Posts) Rules 1997.

(iii) As regards issuance of SC/ST/OBC Certificates to the West Pakistani Refugees, JS (FFR), MHA, stated that during 2008 to May 2012, DCs of Jammu, and

Kathua issued Caste Certificates to 3 and 209 West Pakistani Refugees, respectively. AS (F) opined that the State Government may like to streamline the procedure of issue of SC/ST/OBC Certificates to eligible West Pakistani Refugees.

(iv) In so far as admission of children/grand children of West Pakistani Refugees to technical/professional educational Institutions in the State is concerned, the representative of the State Government informed that they would examine the suggestions of Hon'ble Supreme Court in its order dated 20-2-1987 for issue of executive directions to enable the children/grandchildren of West Pakistani Refugees to get admission in the technical/professional educational institutions in the State. AS (F) suggested that the State Government may also consider reservation of seats in educational/professional education institutions in the State for admission to children/grandchildren of West Pakistani Refugees settled in the State.

(v) Regarding extension of benefits under various Centrally Sponsored Schemes to the West Pakistani Refugees, Secretary (Revenue), Government of J&K, informed that the benefits under the Centrally Sponsored Schemes such as Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) and Integrated Child Development Scheme (ICDS) are being extended to eligible West Pakistani Refugees. He, however, could not confirm whether benefits under Indira Awas Yojna (IAY) are being extended to West Pakistani Refugees. AS (F) suggested that the State Government may take necessary steps to ensure that the benefits under Centrally Sponsored Schemes are also extended to the West Pakistani Refugees.

(vi) In so far as credit facilities to West Pakistani Refugees are concerned, JS (FFR) stated that under the Credit Guarantee Scheme launched by Government of India and SIDBI in August 2000, the West Pakistani Refugees engaged in Micro and Small Enterprises Sector are eligible for credit facilities without collateral security. He further informed that the State Bank of India which is one of the Member Lending Institutions (MLIs) in J&K under the Credit Guarantee Scheme, is extending such credit facilities to West Pakistani Refugees without collateral security. Since other Member Lending Institutions (MLIs) operating in the State are not extending credit facilities to the West Pakistani Refugees under the Credit Guarantee Scheme, AS (F) suggested that the issue needs to be discussed by the concerned Deputy Commissioners in the District Level Coordination Committee meetings and the banks operating in the districts need to be advised to extend credit to the eligible West Pakistani Refugees under the Scheme. The Financial Commissioner (Revenue), Government of Jammu and Kashmir, suggested that MHA may take up this matter with the Reserve Bank of India (RBI) or advise Credit Guarantee Fund Trust for Micro and Small Enterprises (CGTMSE) so that the concerned agency could advise the banks operating in the State to extend the credit facilities to West Pakistani Refugees under the Credit Guarantee Scheme.

(vii) Referring to the demand for Special Financial Package for the West Pakistani Refugees, JS (FFR), MHA, stated that the report of Wadhwa Committee constituted by the State Government mentions that many West Pakistani Refugees after their migration to

J&K had occupied Government/Evacuee land. Subsequently, the State Government allowed them to retain up to eight acres of irrigated land or 12 acres of un-irrigated land subject to certain conditions. JS (FFR) also stated that from the old Annual Reports of then Ministry of Rehabilitation, it has been observed that a number of houses/tenements had been constructed in J&K for rehabilitation of the refugees. He, therefore, felt that to enable MHA to examine the feasibility of extending rehabilitation assistance to the refugees after six decades of their migration to the country, information is required on the following: -

(i) The total number of West Pakistani Refugees settled in the State;

(ii) Whether retention of Government land/Evacuee land by the refugees who went to Pakistan was allowed by the State Government on per family basis?

(iii) Whether these refugees were allowed to retain land in proportion to the land left behind by them in West Pakistan?

(iv) The number of refugee families who were allowed to retain irrigated/un-irrigated land,

(v) The number of West Pakistani Refugees settled in J&K who received assistance from the then Ministry of Rehabilitation by way of allotment of the construction of houses,

(vi) The details of other assistance, if any, received by these refugees from the Central Government/State Government.

(b) Financial Commissioner (Revenue), Government of J&K, stated that the State Government is likely to recommend to MHA a financial package for

rehabilitation of West Pakistani Refugees as one time settlement. He further stated that once a decision in the matter was taken by the State Government, the recommendations of the State Government would be sent to Ministry of Home Affairs for consideration. AS (F) felt that while working out the financial package for rehabilitation of West Pakistani Refugees, the State Government may keep in view the land/properties left behind by the refugees in Pakistan on their migration to India as per old record and agricultural land that had been allowed to be retained by the refugees and assistance from Central/State Government already availed by the refugees.

5. Implementation of relief package for displaced persons from POK, 1947.

ANNEXURE

Government of Jammu and Kashmir,
Civil Secretariat, Revenue Department
Subject: Demands of Displaced Persons of 1947, 1965 and 1971 from POK and Pakistan
Government Order No Rev./Rehab./151 of 2007
Dated 9-5-2007

Sanction is hereby accorded to the constitution of committee to look into the demands of Displaced Persons of 1947, 1965 and 1971 from Pakistan and Pakistan Occupied Kashmir (POK). The Committee shall comprise of: -

1. *Financial Commissioner, Revenue-- Chairman*
2. *Divisional Commissioner, Jammu-- Member Secretary*
3. *Representative of Administration Department not below the rank of Additional Secretary --- Member*

4. *Vice-Chairman, JDA --- Member*
5. *Municipal Commissioner, Jammu --- Member*
6. *Deputy Commissioner, Jammu --- Member*
7. *Deputy Commissioner, Kathua --- Member*
8. *One representative each from DPs of 1947, 1965 and 1971 from POK and DPs of West Pakistan*

Following shall be the terms of reference of the committee

(i) *Enlist the families displaced during 1947, 1965 and 1971 from POK and those displaced from Pakistan, separately.*

(ii) *Identify the problems of these people.*

(iii) *Study the adequacy of measures taken by the government so far for addressing the problems of these people*

(iv) *Suggest measures, if any, necessary for solving the pending problems of these DPs once and for all*

The committee shall furnish its report within a period of three months.

By order of the Government of Jammu and Kashmir.

(Sd./)

Secretary to Government,
Revenue Department

We have seen in the preceding pages the problems faced by West Pakistani displaced people. We have also seen how despite a Supreme Court order, issued more than 26 years ago on February 20, 1987, the Union of India and the government of Jammu and Kashmir have failed to take any concrete steps for helping the West (Punjab) Pakistan DPs. The way forward for these people is to perhaps approach the Supreme Court, once again, so that the court may issue

some fresh directions to both the governments, the government at the Centre as also in Jammu and Kashmir.

As the Supreme Court had remarked in its verdict, steps can be taken to help these people, even without amending the Constitution of Jammu and Kashmir. Of course, the issue of rehabilitation of these DPs is a contentious issue in J&K but that does not mean nothing can or should be done to resolve the issue.

It also needs to be mentioned, even if in passing, that there is a rehabilitation policy now for the youth who had taken to gun in 1988-89 in Jammu and Kashmir. The state government, in which the National Conference (NC) and the Congress are partners, has laid down a policy for taking those youths back into the mainstream who have decided to give up the gun culture.

Therefore, an appropriate rehabilitation policy, to mitigate the sufferings of the West (Punjab) Pakistan DPs will be entirely in the fitness of things.

Refrences

1. Report of the Wadhwa Committee, page 15
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3. Ibid
4. Ibid, p. 3
5. Ibid
6. Ibid, p. 4
7. Ibid
8. Ibid
9. Ibid, p. 6
10. Ibid
11. Ibid
12. Ibid, p. 30, 31
13. Ibid
14. Ibid
15. Ibid, p. 32
16. Ibid, p. 33
17. Bachan Lal Kalgotra v. State of J&K, (1987) 2 SCC 223

CHAPTER-6
Undermining RTI

THE Right to Information (RTI) or transparency law has changed things beyond recognition, across India over the last eight years. It was in the year 2005 that the RTI Act was passed by Parliament and became applicable to states throughout India, except Jammu and Kashmir, that year itself. The RTI law did not apply to J&K due to the operation of Article 370.

The State Government, headed by Chief Minister Omar Abdullah, passed the J&K RTI Act, 2009, on March 20[1], almost four years later. To Omar's credit, this must be said that it was one of the first laws his government passed and sought to bring the transparency law of the state at par with the Central Act. "Have the state subjects, gained or lost, due to the operation of a different transparency law in their state?" is the question we will try to find answers to in the following paragraphs.

The Right to Information (RTI) Act 2005 was passed by Parliament in June 2005 and became applicable throughout India, except in Jammu and Kashmir, within the calendar year. Why did it not apply to J&K? The answer is simple: No law passed by the Indian Parliament is automatically applicable to J&K because of Article 370. The RTI law too did not apply to J&K in 2005.

Only in March 2009, almost four years later, the State Government, headed by Chief Minister Omar Abdullah, who had taken the top executive post in the State on January 5, 2009,[2] got the corresponding RTI law, namely the Jammu and Kashmir Right to Information Act, 2009, passed. But passage of the transparency law did not enable the people to exercise of this right immediately. As happens in many cases in J&K, the State Government very conveniently forgot to take steps necessary to operationalize this law after its passage.

To begin with, in March 2009 itself, the young CM expressed the desire that he wanted Wajahat Habibullah, then Chief Information Commissioner (CIC) of India, to be Chief Information Commissioner of Jammu and Kashmir. This did nothing to further the cause of RTI in J&K because there was no progress on this appointment for several months. The Central Government neither said 'yes' nor 'no' to Omar's request and in the absence of a CIC, the transparency law stood at a standstill in Jammu and Kashmir. Two years were wasted, with law having been passed but no action taken to implement it.

Almost two years later, in February 2011, G R Sofi's name was cleared as first Chief Information Commissioner (CIC) [3] of Jammu and Kashmir. For the constitution of the State Information Commission (SIC), the appointment of two more Information Commissioners (ICs) was mandated by the J&K RTI Act 2009. The two Information Commissioners, S K Sharma, a former Professor of Law in Jammu University, and Nazir Ahmed, a retired Chief Engineer, were appointed several months later.

The right to get information from the officials began transforming the States, and the nation, as people learnt about this instrument which can ensure transparency, and hence probity, in public life, in 2005. But in J&K, the RTI law had to face many challenges and hiccups not witnessed elsewhere in India. In fact, there is widespread impression in J&K that officials try to impede the implementation of this transparency law.

RTI Versions in J&K

The Jammu & Kashmir Right to Information Act, 2009 came into force on 20 March 2009, repealing and replacing the erstwhile Jammu & Kashmir Right to Information Act, 2004 and the Jammu & Kashmir Right to Information (Amendment) Act, 2008. The Act is structured on the Central Right to Information Act, 2005.[4] Jammu and Kashmir has the dubious distinction of being the only State in India, which has passed three different versions of Right to Information law, and still getting these all wrong. The State Government headed by Mufti Mohammed Sayeed, of the Peoples Democratic Party (PDP), who ran a coalition government with the Congress between November 2002 and July 2008, passed the first version in January 2004[5] full 18 months before a Right to Information law was passed by the Central Government. It was passed by the legislature of Jammu and Kashmir on January 5, 2004, as Act no I of 2004.[6] However, the Jammu and Kashmir Right to Information Act, 2004, proved to be a lame duck by all yardsticks, and useless piece of legislation.

Very few people tried to use it to get information from the Government and most of their efforts were stymied and no information was ever provided. Those who had some faith in the efficacy of this law, put up a brave face and said that with time the necessary infrastructure, staff and protocols will be created for its implementation. They were proved wrong by the Government, which did nothing (beyond passing the law) to ensure its operationalization.

This 2004 law was less than a paper tiger. Had the State Government been serious, it could have referred to RTI laws passed by States like Tamil Nadu (1997), Goa (1997), Rajasthan (2000), Karnataka (2000), Delhi (2001), Maharashtra (2002), Madhya Pradesh (2003) and Assam (2002). The provisions of these laws and a study of their operations in other states could have helped Jammu and Kashmir to make an effective law. But that was not to be.

Even in 2005, when the Right to Information (RTI) Act was passed by the Indian Parliament, corrective steps could have been taken by the J&K Government to weed out the weaknesses from its own flawed law. This also did not happen and the citizens remained deprived of the fruits of the transparency law in J&K because due to Article 370, the Central law too did not apply in the State.

In, September 2007, when Ghulam Nabi Azad of the Congress was the Chief Minister, the Government passed the Jammu & Kashmir Right to Information (Amendment) Act, 2007,[7] and it was notified in January 2008. The Amendment Act, 2007, included several amendments to the original 2004 Act to bring it closer to the Central RTI Act 2005.

The J&K Right to Information Amendment Act, 2007,[8] remained enforced in the State till a better law was passed in March 2009. However, it needs to be stressed that the 2007 Act was only in force technically because nothing concrete was done to see that it was implemented in letter and spirit. The first and foremost requirement for making the 2007 Act effective was to notify the Rules to implement it. These Rules were never notified. Also, the Government also did not constitute the Jammu & Kashmir State Information Commission (SIC) as stipulated in the Act. There was no SIC in the State as there was no Chief Information Commissioner (CIC) or Information Commissioners (ICs).

The 2004 J&K RTI Act as also the later J&K RTI Amendment Act, 2007, [9] thus never benefited any citizen though the government spent time, money and precious resources in drafting them, getting them passed and then allowing these laws to stay in a comatose position as long as they lasted. This sums up the experience of the first two versions of the RTI law in the State of Jammu and Kashmir.

The J&K RTI Act, 2009

The Act came into being on March 20, 2009, and at the very beginning, this Act says: An Act to provide for setting out the regime of right to information for the people of the State to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a State Information Commission and for matters connected therewith or incidental thereto.

It came into force immediately.

In Chapter II, the Act defines the Right to Information and Obligations of Public Authorities. Under Section 4, it says[10]

(1) Every public authority shall maintain

(a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under the Act and ensures that all records that are appropriate to be computerized are, within a reasonable time and subject to availability of resources, computerized and connected through a network all over the State on different systems so that access to such records is facilitated;

For reasons best known to the State Government, computerization and cataloguing of the official records had not been done till December 2012.

In the same chapter, under **Section 4, sub-section (b),** [11] the J&K RTI Act, 2009, lays down conditions for pro-active disclosure of information for the benefit of the public. In fact, the provisions relating to the pro-active disclosure are the soul of the RTI law as in an ideal situation, where the authorities disclose most of the information, *suo motu*, and the public needs to use the RTI law rarely.

Under sub-section (b), the public authorities of the Jammu and Kashmir government were to make pro-active disclosure within 120 days of the Act come into force.[12] Since the Act came into force on March 20, 2009, this period was over on September 20, 2009. However, even by the end of the year 2012, the public authorities have not done the needful as mandated under the relevant provisions of the RTI law.

In this connection, it can be said that the State Government uses Article 370 as a shield against empowerment of the masses through the enabling provisions of the RTI law. Its officials usually adopt a very diffident and smug attitude towards most requests for providing information filed by the ordinary citizens. The penal provisions of the Central RTI Act, 2005, are reasonably stringent and these are being widely applied across all other States. In contrast, the J&K RTI Act, 2009, is still in its infancy as far as wider use by the ordinary citizens is concerned.

Half-Hearted Implementation

Another example about the lax, casual and delayed implementation of the RTI law in Jammu and Kashmir pertains to the monitoring and reporting duties enjoined upon the State Information Commission (SIC) itself. In Chapter V titled Miscellaneous,[13] the J&K RTI Act, 2009, speaks about (18.) Protection of actions taken in good faith; (19.) Act to have over-riding effect; (20.) Bar of jurisdiction of courts; (21.) Act not to apply to certain organizations and further, it speaks of, under Section (22.) Monitoring and Reporting.[14]

This Section reads as follows:

> 22. Monitoring and Reporting.[15] – (1.) The State Information Commission shall, as soon as practicable after the end of each year, prepare a report on the implementation of the provisions of the Act during that year and forward a copy thereof to the Government.

(2.) Each Department shall, in relation to the public authorities within their jurisdiction, collect and provide such information to the State Information Commission as is required to prepare the report made under this section and comply with the requirements concerning the furnishing of that information and keeping of records for the purpose of this section.

(3.) Each report shall state in respect of the year to which the report relates, -

(a) the number of requests made to each public authority;

(b) the number of decisions where applicants are not entitled to access to the documents pursuant to the requests, the provisions of the Act under which these decisions were made and the number of times such provisions were invoked;

(c) the number of appeals referred to the State Information Commission for review, the nature of the appeals and the outcome of the appeals;

(d) particulars of any disciplinary action taken against any officer in respect of the administration of the Act;

(e) the amount of charges collected by each public authority under the Act;

(f) any facts which indicate an effort by the public authorities to administer and implement the spirit and intention of the Act;

(g) recommendations for reforms, including recommendations in respect of the particular public authorities for the development, improvement, modernization, reform or amendment to the Act or other legislation or common law or any other matter

relevant for operationalizing the right to access information.

Between March 2009, when the Act came to be applied to Jammu and Kashmir, and February 2013, the SIC of Jammu and Kashmir has not published a single annual report as required under Section 22 of the Act. Given this situation, in the absence of empirical data, a clear assessment of the operationalization of the RTI law, its efficacy and implementation in the State is difficult, if not impossible altogether.

Further, under sub-section (4.)[16] of Section 22, it is said: The Government may, as soon as practicable after the end of each year, cause a copy of the report of the State Information Commission, referred to in sub-section (1) to be laid before each House of the State Legislature.

Since no report has been compiled till February 2013, in the financial year 2011-12, 2010-11 and 2009-10, the question of presenting it in both Houses of Legislature does not arise.

Sub-section (5) of Section 22 reads:

(5.) If it appears to the State Information Commission that the practice of a public authority in relation to the exercise of its functions under the Act does not conform with the provisions or spirit of the Act, it may give to the authority a recommendation specifying the steps which ought in its opinion to be taken for promoting such conformity.

Till December 2012, the SIC had not made a single recommendation to any public authority under this provision. This can either mean that every single public authority has been implementing the RTI law to

perfection. Or it can mean that the SIC has failed to get cooperation from the authorities and thrown in the towel. The second scenario appears more likely, as we have already seen that the SIC has not published any annual report during three successive financial years 2011-12, 2010-11 and 2009-10. It is also not clear whether by the end of the financial year 2012-2013, by which time the J&K RTI Act, 2009, would have completed four years of its operations, an annual report will be there in the public domain.

It is safe to conclude that the citizens of Jammu and Kashmir have suffered, and not gained, as far as transparency in governance in concerned, due to the operation of Article 370, which prevented the implementation of the Central RTI Act, 2005 in Jammu and Kashmir. The state subjects of J&K could start getting the benefits of transparency law much later.

In fact, by March 20, 2013, the state subjects would have been enjoying the fruits of the RTI law only for four years when the citizens elsewhere in India would have been doing the same for eight years.

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9. Ibid.
10. The Jammu and Kashmir Right to Information Act, 2009. Jay Kay Law Reporter (P) Ltd., 2013, p. 15
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15. Ibid.
16. Ibid. p. 37.

CHAPTER-7

Impacting Scheduled Tribes

THE Constitution of India provides for positive discrimination in favour of Scheduled Tribes (STs) in matters of employment, education as also at political level. These special rights are meant for the emancipation of the members of the ST communities living throughout the country. However, most of these rights are not available to members of the STs living within the State of Jammu and Kashmir due to the operation of Article 370. Under the Special provisions made for the emancipation of the STs in the Constitution of India, members of the STs are entitled to several rights which have helped the members of the tribes make strides in different fields, this has ensured their all-round development. A detailed list of provisions relating to the STs has been given on the website[1] of the Ministry of Tribal Affairs, Government of India. The safeguards and enabling provisions meant especially for the STs are categorized broadly as (i) Education and Cultural Safeguards, (ii) Social Safeguards, (iii) Economic Safeguards, (iv) Service Safeguards and (v) Political safeguards.

Provisions relating to the STs have been listed under different headings like Educational, Economic and Public Employment related safeguards as also political safeguards[2]. A look at these provisions makes

it obvious that lots of benefits accrue to the STs throughout the country under the schemes designed by the Government of India. A good number of these rights and benefits are not available to the STs in Jammu and Kashmir because of Article 370. For example, there are six Lok Sabha seats in the state but none of them is reserved for Scheduled Tribes (STs)[3].

State/UT wise Seats in the Lok Sabha & their reservation status

S. N.	STATE /UT	Type of Constituencies on the basis of the Delimitation Order 1976				Type of Constituencies on the basis of the Delimitation Order 2008		
		GEN	SC	ST	TOTAL	GEN	SC	ST
1.	ANDHRA PRADESH	34	6	2	42	32	7	3
2.	ARUNACHAL PRADESH	2	-	-	2	2	-	-
3.	ASSAM	11	1	2	14	11	1	2
4.	BIHAR	33	7	-	40	34	6	-
5.	JHARKHAND	8	1	5	14	8	1	5
6.	GOA	2	-	-	2	2	-	-
7.	GUJARAT	20	2	4	26	20	2	4
8.	HARYANA	8	2	-	10	8	2	-
9.	HIMACHAL PRADESH	3	1	-	4	3	1	-
10.	**JAMMU & KASHMIR**	**6**	**-**	**--**	**6**	**6**	**-**	**-**

11.	KARNATAKA	24	4	-	28	21	5	2
12.	KERALA	18	2	-	20	18	2	-
13.	MADHYA PRADESH	20	4	5	29	19	4	6
14.	CHHATTISGARH	5	2	4	11	6	1	4
15.	MAHARASHTRA	41	3	4	48	39	5	4
16.	MANIPUR	1	-	1	2	1	-	1
17.	MEGHALAYA	2	-	-	2	-	-	2
18.	MIZORAM	-	-	1	1	-	-	1
19.	NAGALAND	1	-	-	1	1	-	-
20.	ORISSA	13	3	5	21	13	3	5
21.	PUNJAB	10	3	-	13	9	4	-
22.	RAJASTHAN	18	4	3	25	18	4	3
23.	SIKKIM	1	-	-	1	1	-	-
24.	TAMIL NADU	32	7	-	39	32	7	-
25.	TRIPURA	1	-	1	2	1	-	1
26.	UTTAR PRADESH	63	17	-	80	63	17	-
37.	UTTARAKHAND	4	1	-	5	4	1	-
28.	WEST BENGAL	32	8	2	42	30	10	2
29.	ANDAMAN & NICOBAR ISLANDS	1	-	-	1	1	-	-
30.	CHANDIGARH	1	-	-	1	1	-	-

31. DADRA & NAGAR HAVELI	-	-	1	1	-	-	1
32. DAMAN & DIU	1	-	-	1	1	-	-
33. DELHI	6	1	-	7	6	1	-
34. LAKSHADWEEP	-	-	1	1	-	-	1
35. PONDICHERRY	1	-	-	1	1	-	-
TOTAL	**423**	**79**	**41**	**543**	**412**	**84**	**47**

A perusal of the table given above makes it clear that in all 47 Lok Sabha constituencies are reserved for the Scheduled Tribes (STs), as of 2013. However, it also makes clear that all six Lok Sabha constituencies in Jammu and Kashmir are general category and not reserved constituencies. Thus no Lok Sabha seat in Jammu and Kashmir is reserved for the Scheduled Tribes (STs).

Besides the reservation in Parliament, for the political empowerment of the STs, there are provisions for reservations in the Legislative Assembly of the state. The table below shows the reservation status of the Legislative Assembly seats, state-wise, for the members of the Scheduled Castes (SCs) and Scheduled Tribes (STs)[4].

State/UT wise Seats in the Assembly and their Reservation Status

STATE /UT	Type of Constituencies on the basis of the Delimitation Order 1976			TOTAL	Type of Constituencies on the basis of the Delimitation Order 2008		
	Gen.	SC	ST		Gen.	SC	ST
States							
Andhra Pradesh	240	39	15	294	227	48	19
Arunachal Pradesh	1	-	59	60	1	-	59
Assam	102	8	16	126	102	8	16
Bihar	204	39	-	243	203	38	2
Chhattisgarh	46	10	34	90	51	10	29
Goa	39	1	-	40	39	1	-
Gujarat	143	13	26	182	142	13	27
Haryana	73	17	-	90	73	17	-
Himachal Pradesh	49	16	3	68	48	17	3
Jammu & Kashmir*	**80**	**7**	**--**	**87***	**-***	**-***	**-***
Jharkhand	44	9	28	81	44	9	28
Karnataka	189	33	2	224	173	36	15
Kerala	126	13	1	140	124	14	2
Madhya Pradesh	156	33	41	230	148	35	47

Maharashtra	248	18	22	288	234	29	25
Manipur	40	1	19	60	40	1	19
Meghalaya	5	-	55	60	5	-	55
Mizoram	1	-	39	40	1	-	39
Nagaland	1	-	59	60	1	-	59
Orissa	91	22	34	147	90	24	33
Punjab	88	29	-	117	83	34	-
Rajasthan	143	33	24	200	141	34	25
Sikkim**	18	2	12	32**	17**	2**	12**
Tamil Nadu	189	42	3	234	188	44	2
Tripura	33	7	20	60	30	10	20
Uttar Pradesh	314	89	-	403	318	85	-
Uttarakhand	55	12	3	70	55	13	2
West Bengal	218	59	17	294	210	68	16
Total	2936	552	532	4020	2789	590	554
UTs							
Andaman & Nicobar Islands	-	-	-	-		-	-
Chandigarh	-	-	-	-		-	-
Dadra & Nagar Haveli	-	-	-	-		-	-
Daman & Diu	-	-	-	-		-	-
Delhi	57	13	0	70	58	12	-
Lakshadweep	-	-	-	-		-	-
Pondicherry	25	5	-	30	25	5	-

Total	82	18	-	100	83	17	
Grand Total	**3018**	**570**	**532**	**4120**	**2872**	**607**	**554**

*(*Under the Constitution of Jammu & Kashmir, the number of seats in the Legislative Assembly of that state excluding the 24 seats earmarked for Pakistan occupied territory is 87 out of which 7 seats have been reserved for the Schedule Caste in pursuance of the Jammu & Kashmir Representation of the People Act 1957.)*

A perusal of the contents of the table above makes it clear that of the 87 Legislative Assembly seats in Jammu and Kashmir, 80 are general category constituencies (unreserved) and seven are reserved for Scheduled Castes (SCs). However, not a single seat is reserved for the Scheduled Tribes (STs).

Let us now what are the constitutional provisions for granting reservations to Scheduled Tribes (STs) across India. It will be pertinent to refer to Part XVI of the Constitution of India titled "Special Provisions Relating to Certain Classes.[5]"

In Part XVI are given Articles from 330 to 342.

330. Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People.

331. Representation of the Anglo-Indian community in the House of the People.

332. Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States.

333. Representation of the Anglo-Indian community in the Legislative Assemblies of the States.

334. Reservation of seats and special representation to cease after seventy years.

335. Claims of Scheduled Castes and Scheduled Tribes to services and posts.

336. Special provision for Anglo-Indian community in certain services.

337. Special provision with respect to educational grants for the benefit of Anglo-Indian Community.

338. National Commission for Scheduled Castes.

338A. National Commission for Scheduled Tribes.

339. Control of the Union over the Administration of Scheduled Areas and the welfare of Scheduled Tribes.

340. Appointment of a Commission to investigate the conditions of backward classes.

341. Scheduled Castes.

342. Scheduled Tribes.

In Jammu and Kashmir, most of these things do not apply due to the Constitution (Application to Jammu and Kashmir) Order, 1954 (C.O. 48) which says[6]: In exercise of the powers conferred by clause (1) of Article 370 of the Constitution, the President, with the concurrence of the Government of the State of Jammu and Kashmir, is pleased to make the following Order:—

1. (1) This Order may be called the Constitution (Application to Jammu and Kashmir) Order, 1954.

(2) It shall come into force on the fourteenth day of May, 1954, and shall thereupon supersede the Constitution (Application to Jammu and Kashmir) Order, 1950.

About Part XVI, this order says: *(a) Articles 331, 332, 333, 336 and 337 shall be omitted.*

Since the enabling provisions under the Constitution of India are not applicable to the State of Jammu and Kashmir due to Article 370, as is clear from the paragraphs above, the STs do not get many of the benefits envisaged therein. It is pertinent to point out here that there is significant population of Scheduled Tribes in Jammu and Kashmir. Overall, the population of STs in Jammu and Kashmir stands at 10.98, according to the census data of 2011.

There are two districts, Kargil and Leh, where the population of STs is more than 50 per cent. There are another three districts, namely Poonch, Rajouri and Reasi, in which the population of STs is between 25 per cent and 50 per cent. If the provisions of the Indian Constitution regarding reservations for STs in the Lok Sabha and Legislative Assemblies were to apply to Jammu and Kashmir, some seats would surely have been reserved for the STs.

In fact, free flow of the provisions of the Indian Constitution regarding the STs in Jammu and Kashmir can lead to reservation of seats in the panchayats as well throughout the state. However, there are no seats reserved for the STs in J&K either at the panchayat level, in the Legislative Assembly as also the Lok Sabha. This has happened because of Article 370 which acts as an effective impediment against the

enabling provisions under the Indian Constitution for empowering the STs.

An interesting observation about the presence of Scheduled Tribes (STs) in Jammu and Kashmir is that officially, there were no STs in J&k, till 1989, when the Constitution (Jammu and Kashmir) Scheduled Tribes Order, 1989, (C.O. 142)[7] was passed. The order reads, in exercise of powers conferred by clause (1) of Article 342 of the Constitution of India, the President, after consultation with the Government of Jammu and Kashmir, is pleased to make the following Order:-

1. This Order may be called the Constitution (Jammu and Kashmir) Scheduled Tribes Order, 1989.
2. The tribes or tribal communities, or parts of, or groups within, tribes or tribal communities, specified in the Schedule to this Order shall, for the purposes of the Constitution, be deemed to be Scheduled Tribes in relation to the State of Jammu and Kashmir so far as regards members thereof resident in that State.

The Schedule: 1. Balti 2. Beda 3. Bot, Boto 4. Brokpa, Drokpa, Dard, Shin 5. Changpa 6.Garra 7. Mon 8. Purigpa 9.Gujjar 10. Bakerwal 11. Gaddi 12. Sippi

It bears mention here that in the 1989 Order, only the members of the first eight communities were given the status of STs. It was in 1991 that the other communities were named as STs, taking the total to 12. Gujjars and Bakerwals were declared as STs through Act 36 of 1991 with effect from 19.4.1991 and Gaddis and Sippis with effect from 20-8-1991.

It also bears mention here that the Gujjars and Bakerwals today constitute about 80 per cent of the ST population of J&K. Paradoxically, they had not been

given the benefits admissible to STs, till April 1991, when Chandra Shekhar was the Prime Minister during a brief period, and the State of Jammu and Kashmir was under Governor's rule.

On the website of the Tribal Affairs ministry, the statistics pertaining to the Scheduled Tribes are given under the heading ST Statistics – At a Glance, on the homepage itself. On opening this folder, one reaches http://tribal.nic.in/WriteReadData/CMS/Documents/201306061001146927823STProfileataGlance.pdf.

This is a compilation of statistics about the STs in different states of the country. On page 5, the list of districts, state-wise, with population of over 50 per cent is given, as also the list of districts with population between 25 per cent and 50 per cent. The figures pertaining to Jammu and Kashmir say that the overall population of the state is 1,25,41,302 according to the census data of 2011.

The Scheduled Tribes (STs) comprise 11.9 per cent of this, and their number has been put at 14,93,299. Besides, the data makes it clear to that there are two districts in J&K with over 50 per cent population and three districts with ST population between 25 per cent and 50 pent. These districts are Kargil, Leh, Poonch, Rajouri and Reasi, the last one was carved out in 2007, and consequently details about this district are not available in the 2001 census data. In 2001, Kargil had the highest ST population in all the districts of J&K, followed by Leh, Poonch, Rajouri and Reasi.

In the Kargil district, there are 18,338 households and the total population of the district has been put at 1,40,802. Of them, the population of STs is 1,22,336

which comes to a percentage of 86.9, according to the census data demographics.[8]

There are 21,909 households in the Leh district, the other district comprising the Ladakh region. The total population of the district has been given as 1,33,487 and of them, 95,857 are Scheduled Tribes (STs). In terms of percentage, this comes to 71.8 per cent meaning in Leh, STs constitute 71.8 per cent of the population.[9]

In Poonch, there are 90,261 households and the total population is 4,76,835 of whom 1,76,101 are Scheduled Tribes (STs). In terms of percentage, this comes to 36.9 meaning thereby that STs form 36.9 per cent of Poonch population. [10]

In Rajouri district of Jammu and Kashmir, the total number of households has been pegged at 1,30,401 and the total population is 6,42,415 of whom 2,32,815 are Scheduled Tribes (STs). This comes to a percentage of 36.2 meaning the STs comprise 36.2 per cent of Rajouri population.[11]

In Reasi, the total number of households is pegged at 56,689 and the total population is 3,14,667 of whom 88,365 are Scheduled Tribes (STs). This comes to a percentage of 28.1 meaning the STs comprise 28.1per cent of Reasi's population.[12]

If the enabling provisions of the Constitution of India were to be applied to Jammu and Kashmir (these do not apply here because of Article 370), all the assembly constituencies in Kargil district (86.9 per cent STs) and Leh (71.8 per cent ST population) will have to be reserved for STs. There are two Legislative Assembly constituencies in Kargil district, namely Kargil and Zanskar; similarly, there are two

Legislative Assembly constituencies in Leh district, namely Leh and Nubra. At the level of the Lok Sabha also, the Leh Lok Sabha constituency, comprising Leh and Kargil districts, will have to be then reserved for the ST candidates only. But this has not happened because Artcile 370 bars the application of the enabling provisions of the Constitution of India for political reservation to STs in Jammu and Kashmir.

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CHAPTER - 8

Disempowering Grassroots

DECENTRALIZATION of power to the grassroots has been a cherished goal of successive governments in India. Gradually, but surely, the governments took steps to decentralize powers in a manner that the process of decision-making became more democratic and inclusive. Indian Parliament passed the 73rd and 74th Constitutional Amendments to empower the rural and urban populace by giving them self-governance through Panchayati Raj Institutions (PRIs) and Urban local bodies (ULBs).

While the 73rd Constitutional Amendment[1] sought to empower Panchayati Raj Institutions, the instruments of governance at the village level in the rural areas, the 74th Constitutional Amendment[2] so empowered the urban local bodies. These amendments however, do not apply to the state of Jammu and Kashmir. In the part about its objects and reasons, the 74th Constitutional Amendment, notes: In many states, local bodies have become weak and ineffective on account of a variety of reasons, including the failure to hold regular elections, prolonged supersession and inadequate devolution of powers and functions.

The anomalies and weaknesses in the PRIs and the ULBs were sought to be redressed through these Constitutional amendments.

In the following pages, we attempt to analyse how panchayats and ULBs have been functioning in Jammu and Kashmir. We will see whether the panchayats and

ULBs in J&K give more powers to the people in J&K or less, as compared to the people living in the rest of India.

PRIs as well as ULBs suffer from severe disabilities due to the operation of Article 370 in Jammu and Kashmir. Under this Article, the State created its own Panchayati Raj Act in 1989[3], and its own set of laws for governing the ULBs, a couple of years before 73rd and 74th Constitutional Amendments empowering the PRIs and ULBs came into being.

The Jammu and Kashmir Panchayati Raj Act, 1989, by the then prevalent standards of decentralization of governance, was a progressive step. However, once the Central government passed the 73rd Constitutional Amendment and gave PRIs constitutional status and backing, the empowerment of these grassroots institutions of governance changed things for the better, all across India and left J&K far behind.

On paper, panchayati raj system in J&K has a three-tier structure but in effect, ad-hocism and arbitrariness prevail at all levels. In theory, there should be PRIs at village, block and district levels. However, it is strange that elections to PRIs at the block level have not been held even once till date, in J&K, while that has happened many times in other parts of India.

It is widely believed by experts and academicians from the field of political science that the freedom to function in a meaningful manner is the key to empowerment and it is integral for fostering a sense of participation among the various stakeholders. They also believe that the institutions of self-governance are

the future, that these institutions will progressively gain more importance in functional democracies.

At a conceptual level, experts believe, the institutions of self-governance are designed to counter the unitary nature of state and federal governments. Devolution of powers, to the regions and sub-regions, to the district, to block level and beyond, is necessary for states to take all stakeholders on board. The advantage of the devolution lies in deepening of democratic institutions, and hence democracy.

In Jammu and Kashmir, panchayat elections[4] at the village level were held in 2001 and the term of the panchayats so elected ended in 2006. During the entire tenure of five years, the elections to the next levels of block (taluka) and district (zila) were never held. This also takes us to the question as to why the panchayat elections at the village (called halqa level in J&K) were held at all. We will attempt to answer to that question a little later.

The State Government then allowed the panchayats to lapse. For almost five years, once again, there were no panchayats in J&K. Then suddenly, in 2011, the next round of elections[5] for panchayats was held at the village level. However, elections for the Block Development Councils (BDCs), the panchayat bodies at the block level and at the district level, have not been held till date.

Under 73rd Amendment to the Constitution of India, the State Governments, other than that of J&K, have to ensure timely elections of three-tier panchayat bodies, the third layer of governance. The elections to PRIs are held with the same regularity with which the elections to assemblies and parliament are held. Even

the 1989 Panchayati Raj Act of Jammu and Kashmir envisages holding of elections before the expiry of the term of the panchayats but this provision has been observed in breach only.

Toothless Tigers

Incidentally, even the village level panchayats constituted after holding panchayat elections under the State's own Act, an offshoot of the autonomy granted to J&K under Article 370, are emaciated toothless tigers for a variety of reasons. Since the next two levels of PRIs have not been created, there is uncertainty and despondency about the functioning and powers of these grassroots tools of democratic governance.

The Jammu and Kashmir Government has been claiming credit for holding panchayat elections and has even released full page advertisements in local newspapers on many occasions between 2011 and 2012 to this effect. However, the fact of the matter is that the panchayats are of no consequence in J&K in day to day governance at the grassroots level because they do not have any significant powers under the State's Act. They do not participate in any planning process in any meaningful manner, nor do they have requisite funds to carry out any development works.

This disempowerment of the panchayats has been done under the separate Act applicable to J&K. Leave aside States like Kerala and Karnataka, where the PRIs are flourishing and functioning very well, the PRIs in J&K are an abject apology of their counterparts in most other States of the union as well.

It bears mention here that in the States with the best PRI structures and operationalization, like Kerala and Karnataka, the PRIs can get as much as between 45 to 50 per cent of funds available with the respective State Governments. Substantial amounts of both Plan and Non-Plan funds are allocated to panchayats in these States. In case of J&K, however, this amount may be in the range of barely one per cent or even less.

The State Government allocated Rs 1 lakh each to all panchayats[6] across Jammu and Kashmir in the beginning of 2012 for developmental activities. The elected panchayat members call this small allocation a cruel joke and several experts point out that this amount is not enough to build a even a decent toilet. Village leaders also wonder how and what development activities they can undertake with this measly sum in their respective villages; and rightly so.

In fact, the Ministry of Panchayat Raj of the Central Government allocates substantial funds for smooth functioning of three-tier panchayats. The Central Government allots these funds to State Governments only if panchayats exist in the States. In the constitutional scheme of things following the implementation of the 73rd Amendment, there are provisions that these funds cannot be allocated to the States which fail to set up three tier PRIs.

The State of Jammu and Kashmir is perhaps the only such State in the Indian Union which has forfeited funds meant for panchayats due to its failure to constitute panchayats, year after year. Even in 2011, the panchayat elections were held perhaps only to ensure resumption of allocation of funds to the State coffers.

It is a fit subject far investigation as to how much of funds allocated by the Central Government to the State for PRIs were actually passed on to the PRIs by the State.

A fairly widespread impression is that the State Government in Jammu and Kashmir doles out meager amount, out of the funds received from the Central Government, to the PRIs as if it is doing charity and the PRIs are beggars, not integral partners in governance.

On a number of occasions, the State Government has carried out some amendments[7] to the J&K Panchayati Raj Act, 1989. In 2004, the Act was amended with the limited purpose of defining reservation of seats in the PRIs for Scheduled Castes (SCs), Scheduled Tribes (STs) and the women. For reasons best known to it, the Government made the provision of such reservations only at the level of panchs but not in case of posts of sarpanch.

In 2011, another amendment was carried out to the Act for the creation of State Election Commission. Still another amendment was carried out to the original Act in relation to the State Finance Commission. Around the same time, a high powered committee, set up by the government and headed by Chief Secretary Madhav Lal[8], was asked to make recommendations for empowerment of panchayats.

This committee suggested handing over limited powers with respect to 14 government departments to the panchayats. Under the 73rd Amendment, panchayats have far more powers, and that too over at least 24 subjects. The committee thus failed to help

real empowerment and the panchayat members felt cheated.

Useless Changes

A thorough perusal and a close scrutiny of the amendments to 1989 Act of the State shows that these changes are mostly cosmetic and fall far short of the enabling provisions about the PRIs contained in the 73rd Amendment. Therefore, the PRIs in J&K continue to suffer from infirmities, flaws or deficiencies and are lame duck institutions, not instruments of self-governance at the grassroots level.

What undermines the functioning of the PRIs in Jammu and Kashmir is the overwhelming presence of government officials in all of them, at all the three levels. This presence of officials virtually makes panchayats subsidiary to administration, as opposed to autonomous functional bodies of local self-governance in rural areas, which they ideally should be.

Under the 1989 Act, the gram sevak or sevika (male and female village level worker of government) is the ex-officio secretary of the panchayat at the village level. Similarly, the Block Development Officer (BDO) is the secretary of the panchayat at the block level and the Deputy Commissioner (or District Magistrate) is the secretary of the panchayat at the district level.

Under the Model Panchayat Act, this is impossible because at all three levels, panchayat members themselves get these posts leading to functional freedom and autonomy. In J&K, the officials dictate functioning of the PRIs at all levels. Experience shows that the presence of the government officials acts as a

deterrent for the smooth and autonomous functioning of the PRIs.

In other States, gram sevak (or sevika), BDO and the DC or DM, all government functionaries, are answerable to the elected panchayat members at the three levels of panchayati raj governance and functioning. In Jammu and Kashmir, the situation is just the opposite with government functionaries lording over the elected members of the PRIs given the non-applicability of the 73rd Amendment and the nature of the State's Panchayat Act.

The functioning of the PRIs and their effectiveness is also undermined in Jammu and Kashmir by the manner in which the panchayat representatives are elected. There is direct election only at the lowest or village level with indirect elections envisaged for block and district level PRIs.

At the block level, the panchayat members are to be elected by the panchs and sarpanchs of the panchayats falling within the block. The panchs and sarpanchs thus constitute the Electoral College for elections to the block level. In other States, elections to the block development councils (BDCs) are also held by direct voting.

Needless to say indirect voting and limited Electoral College, undermine democracy at the grassroots. In J&K, the Chairman of the block level panchayat is an elected representative but not all voters of the block elect him but only the limited electoral college of elected panchs and sarpanchs as envisaged in the J&K Panchayati Raj Act 1989.

These peculiarities continue at the district level too and in the district development boards (DDBs), which

are involved in planning development activities for the districts. There is no provision for direct election of panchayat members to DDBs in Jammu and Kashmir. The Vice Chairperson of the DDBs is elected, but not directly. Very few electors, in fact the members of the DDBs, dominated by legislators of the respective districts and senior district administration officials, elect him/her.

The prevailing practice in the functioning of the DDBs in Jammu and Kashmir is that they are headed by a senior minister (in most of the districts a Cabinet minister) nominated by the Chief Minister. The entire planning process, prioritization and allocation of funds in the DDBs, is actually dominated by legislators of the ruling party/parties. Even in the districts where the opposition party/parties have a substantial number of legislators, the legislators affiliated to the ruling party/parties can influence the planning and other related processes, disproportionately. In such a scenario, the inputs from the panchayats are ignored and do not find expression in planning and hence execution.

Chief Minister of Jammu and Kashmir often presides over DDB meetings, along with his retinue of ministers, top bureaucracy of the state and legislators in some districts. How can the panchayat members be expected to function in an autonomous manner, independent in their sphere, at village, block and district levels then?

Official Domination

The preponderance of government functionaries at all levels of panchayat bodies goes against the spirit of

democratic decentralization. It is not clear as to how and which powers will be exercised by the elected panchayat members, alone, when the MLAs, MLCs, MPs (both from Lok Sabha and Rajya Sabha), besides government officials, can take decisions on subjects which are in the domain of the panchayat members under 73rd Amendment.

There is no clear delineation of powers of the panchayats in which the legislators of different description as also bureaucrats will not be able to interfere and let panchayats function, autonomously.

The elections to the panchayats can be held on party or non-party basis as per the whims, fancies and convenience of the ruling dispensation(s). In 2011, the elections to the village level panchayats were held on non-party basis. Yet, after the results had been declared, the ruling National Conference (NC), its coalition partner Congress and the opposition Peoples Democratic Party (PDP) claimed that the candidates affiliated to them had won in most constituencies.

In a recent development, a large number of elected representatives of panchayats, both panchs and sarpanchs, have come together to form an apex organization styled as the All Jammu and Kashmir Panchayat Conference[9]. The conference was formed in the wake of killing of some panchayat members in the Kashmir valley. The panchayat conference has been rather direct in its approach and condemned the denial of powers to panchayats by the State Government.

In September, October and November 2012, the issue of providing protection to elected panchayat representatives gained sharper focus in the State. On November 8, the then Union Home Minister Sushil

Kumar Shinde[10] issued a statement in New Delhi saying the Central Government was ready to help Jammu and Kashmir in this matter. He said his Ministry was willing to provide the required assistance to the State Government in J&K for creating a sense of security among the elected panchayat members.

Some representatives of the panchayat conference, however, said that the State Government, as also the Central Government, were obfuscating the issue. Gulzar Ahmed Beigh, a representative from Budgam district in Kashmir, held a press conference in Srinagar and said the issue was not "security to panchayat members, but empowerment of panchayats". General Secretary of the panchayat conference, Anil Sharma, said in Jammu that the issue of security was being deliberately used by the Government to divert attention from the larger issue of empowerment of the PRIs.

A team of the panchayat conference, led by Shafiq Mir, the sarpanch of Poshana village of Rajouri district, met powerful Congress general secretary Rahul Gandhi in New Delhi in October 2012. The event was widely reported in the national media, as also local newspapers in Jammu and Kashmir, as Rahul said that his party was committed to empower the panchayats. The team members pleaded with Rahul to ensure that panchayats were adequately empowered in J&K. Precious little has, however, been done to actually make sure that panchayats do not remain dummies, which till now they are, in the State.

Rajya Sabha member and former Union Panchayati Raj Minister Mani Shankar Aiyar, visited Kashmir Valley in October 2012, met representatives of panchayats. In an interview to Srinagar-based daily

English newspaper Greater Kashmir, he said that he had interacted with at least 500 panchs and sarpanchs. All of them were unanimous that the panchayats were powerless and for effective local self-governance at the grassroots level, it was imperative to take steps that will empower panchayats.

It needs to be mentioned here that Aiyar was the first Panchayati Raj Minister at the Centre. He is also credited with being an architect of empowerment of panchayats.

"I had an interaction with many Panchayat representatives. I think panchs and sarpanchs here (in J&K) are not happy with the way things are moving. They are without any power; it is very unfortunate, and despite people coming out and voting in large numbers in panchayat elections in rural areas. No authority has been delegated to these elected representatives by the state government and in a way making them dysfunctional[11]," he said.

"It is very unfortunate to see rural representatives here are powerless. These people stood and fought elections, despite threats from militant groups and even people in rural areas voted in large numbers in order to elect the representatives for their respective areas but they have not been delegated any authority in decision making. It is disappointing that these Panchs and Sarpanchs have no functions."

"I went to Goguldara area in district Baramulla, a Sarpanch there told me that the total funds that the government had given them is Rs 1 lakh only and that is to be spent on the construction of Panchayat Ghar. How would you except from these people to do any work for their areas when they have no funds? They

have neither heard of any grants from the Central government, forget about receiving a single penny from government schemes. Now the question arises, how would these representatives fulfill their promises which they have made to their people? As a result, democracy becomes a casualty in all this. People lose their faith in democratic set-up," he told the interviewer.

Commenting on the question of disempowerment of panchayats, Aiyar hit the nail on the head when he said: "Unfortunately, the MLAs of Jammu and Kashmir do not appear to be listening to the voices of panchayat representatives; as a result the State is strengthening the confrontation between MLAs and sarpanchs. It also seems that the MLAs are not interested in giving power to these representatives; as a result weakening democracy in the state.

"Actually, the Congress MLAs are committed to 73rd Amendment and the PDP claims that they would also like to see better panchayats. All that means it is only the National Conference which has to make up their mind, whether they want this amendment or not. But I think the state government should not waste this opportunity. I hope better sense prevails and devolution of power to panchayats is done at the earliest."

"I will take back the message of sarpanchs and panchs who have not been given any powers. I would urge Union Ministry of Panchayati Raj to make sure that the panchayats are empowered and are given an important role in decision-making. But the Central Government can only provide funds and direction, ground work is to be done by the State Government."

The paragraphs above paraphrase Mani Shanker Aiyar's views on the functioning of the panchayats in Jammu and Kashmir. It is indeed a strong indictment of the manner in which panchayats have been kept powerless, by the State Government, through deliberate design. It bears mention here that the Congress party, to which Aiyar belongs, has been in power in J&K since November 2002, when it formed a coalition government with the PDP. In 2008, it dumped the PDP to join hands with the NC for forming the government in the State.

Congress Stance

The question of empowerment of panchayats is included in the manifestoes the Congress issued prior to the 2002 Legislative Assembly elections as also the 2008 Legislative Assembly elections. On both occasion, the Congress pledged before the masses that if voted to power, the party will empower panchayats in J&K through implementation of 73rd Amendment.

In the manifesto issued by the J&K Pradesh Congress Committee before the 2002 Legislative Assembly elections in J&K, the issue was discussed threadbare on page 11. Under the heading Panchayats, it said: "Our party is committed to establish Panchayati Raj in conformity with the letter and spirit of 73rd Amendment of the Indian Constitution. This alone shall enable us to devolve real power to the Panchayat level and take the wind out of the sails of those who are crying hoarse for autonomy and trifurcation simply to hoodwink the people. We firmly believe that the establishment of Panchayati Raj in the real sense is the only way for the people's development activities."

In September-October 2002, when Legislative Assembly elections were held in Jammu and Kashmir, the National Conference (NC) was a part of the National Democratic Alliance (NDA) government at the Centre headed by Prime Minister Atal Behari Vajpayee. The Congress had fought the elections against the NC and its strong showing at the hustings had ousted the then ruling NC from power.

The situation in Jammu and Kashmir when the Legislative Assembly elections were held in November-December 2008 was somewhat different as the Congress and the PDP had fallen out as coalition partners. Yet, there was no change in the manifesto of the Congress when it dealt with the issue of empowerment of panchayats.

The manifesto issued by the Jammu & Kashmir Pradesh Congress Committee in the run-up to the 2008 Legislative Assembly elections was termed as "Manifesto of peace, dignity and hope for election to the Jammu and Kashmir Legislative Assembly 2008".

Dealing with the issue of empowerment of panchayats, the Congress party said in its manifesto (on page 22) that if elected to power, the Congress will bring in 73rd Amendment in the State. The manifesto said: J&K Panchayati Raj Act to be amended to bring (it) in conformity with the provisions as contained in 73rd Amendment to the Constitution of India.

Perhaps the single most important factor why panchayats are powerless in J&K is the source of their power itself: J&K Panchayati Raj Act 1989. The Act has not been included, through a Constitutional Amendment, in the Constitution of Jammu and

Kashmir which the Constituent Assembly of the State drafted between 1951 and 1957.

In contrast, the three-tier panchayati raj system in other States of India is rooted in the 73rd Amendment of the Constitution of India. This means that tampering with the panchayati raj system in other States is a very, very difficult proposition because it is not based on a weak law, as in J&K, but the Constitution, the fountainhead of all laws of the land.

For the implementation of several Centrally Sponsored Schemes, the involvement of the panchayats is mandatory. In J&K, the role of the panchayats to participate in these schemes is limited. The State Government does not allocate any funds for these schemes and thus should not have say in their implementation. Yet, ministers often meddle in these schemes and lord over lower administration functionaries as also panchayat members. For example there is practically no involvement of the Panchayats in the Pradhan Mantri Gram Sadak Yojana and the schemes under MGNREGA will only be handed over to the Panchayats from 2014 onwards.

Whatever little utility or functions are there for the panchayats to perform in J&K, are courtesy these schemes or other allied schemes for which the Centre gives grants, on certain terms and conditions, which virtually force the State Government to co-opt the panchayats. The State Government does not sweat for these schemes because it does not provide any funds at all from its own coffers. Yet, its functionaries boast that the panchayats have executed developmental works because of it, not in spite of, which is the truth and the ground reality.

Incidentally, the panchayats have not been empowered in a manner in which they can mobilize their own resources through imposition of some local taxes.

Article 370 has been used as an instrument, tool or device by the State Government to prevent the application of 73rd Constitutional Amendment which empowers local self-governance in the rural areas. The manner in which the State's own Act has been drafted impedes, instead of facilitating, the devolution and decentralization of powers.

National Conference Stance

The National Conference, founded by Sheikh Mohammed Abdullah, has steadfastly opposed the implementation of 73rd Amendment in Jammu and Kashmir, claiming it erodes the autonomy of the State guaranteed by Article 370. Omar Abdullah, third generation scion of the Abdullah dynasty, who took charge as Chief Minister of the State on January 5, 2009, categorically ruled out the possibility of implementation of 73rd Amendment in November 2012.[12]

He issued a press statement to this effect wherein he made it clear to his coalition partner, the Congress, that the NC will not allow the Central law pertaining to empowerment of panchayats to be applied to J&K.

In J&K, the real empowerment of panchayats can happen only if a majority of legislators join hands, forcing the government to do so. However, it seems that the legislators of the state, whether they be Members of Legislative Assembly (MLAs) or Members of Legislative Council (MLCs), do not want

to share powers with the panchayats. This is the crux of the problem and lip service in public notwithstanding; the legislators are together in keeping the panchayats powerless.

Given this scenario, panchayats do not have any real decision-making powers, despite claims to the contrary made by the State Government. The real devolution of powers to panchayats can happen only if the bureaucracy is given clear orders to keep off certain areas identified exclusively as domains of the panchayats.

In the absence of such clear and lucid orders, the same subjects are dealt with by the bureaucracy as also panchayats. Since bureaucrats have more powers in the present set-up, the panchayats automatically get undermined and disempowered due to an overlap of work areas.

The State Government has been claiming that it has devolved powers to panchayats but a scrutiny of such powers leaves a bad taste in the mouth. The so-called powers conceded to the panchayats are in fact responsibilities which the Government has shed, without in any way diluting its own authority. This shows an utter lack of will on the part of the Government, and hence the administrative machinery, to share real powers with the panchayats.

For true empowerment, the functions, duties and responsibilities and powers of the panchayats need to be defined clearly. Beyond defining these roles, the panchayats should have resources to discharge these functions and for that resources are required.

In J&K, panchayats have been given some responsibilities, in the name of devolution of powers,

and the Government has loaded them with these without giving them corresponding authority or powers. This is only eroding the faith of the people in democratic institutions at the grassroots level further.

To site just one example, if someone goes to Public Health Engineering (PHE) department, which is responsible for providing potable (drinking) water to localities, for installation of a new hand pump in a locality, the person is sent back by the officials to get a supporting resolution from the panchayat of the area. However, the panchayats have no role in planning and prioritizing new hand pump or tap connections doing which remains the exclusive domain of the engineers.

The urban local bodies of J&k suffer from similar disempowerment as the State Act governing them suffers from similar infirmities as the J&K Panchayati Raj Act, 1989. The ULBs of the State are therefore as disempowered and powerless in urban areas as panchayats are in the rural areas. Incidentally, it needs to be mentioned here that 74th Constitutional Amendment which empowers the ULBs, too, is not applicable in Jammu and Kashmri, courtesy Article 370.

Statistics regarding the assets panchayats have in the State paint a bleak picture of disempowerment and lack of support from the government. Of the 4,128 Panchayat halqas (village level panchayats), 1,788 were without Panchayat Ghar buildings and only 899 Panchayat Ghar buildings had been taken up for construction till October 2012.

This information was provided by the rural development department (RDD) during a session of the Legislative Council in second week of October 2012 in reply to a question by a legislator. Further, no

Panchayat Ghar had been completed as identifying the land for the purpose was taking too long.

Opinion of Experts

According to former Chief Information Commissioner (CIC) of India, Mr Wajahat Habibullah, devolution of powers in Jammu and Kashmir is a subject that needs to be explored in all its dimensions. He made these remarks while participating in a seminar organized at Jammu University, with Centre for Dialogue and Reconciliation (CDR) in November 2012.

"The 73rd Amendment of the Indian Constitution provides an independent election commission for panchayats - a provision which is not available in the J&K Panchayati Raj Act 1989. Except J&K, all the states have election commissions for panchayats. Similarly, there must be an independent and autonomous state finance commission which decides about the devolution of financial powers to the panchayats," said Wajahat.

He was speaking at the inaugural of a three-day national seminar on "Devolution of Powers in Jammu and Kashmir" at the University of Jammu, as reported in The Tribune, a leading newspaper of the north India.[13]

It needs to be mentioned here that he was an Indian Administrative Service (IAS) officer of J&K cadre who continues to take keen interest in the developments pertaining to the state even now. While on deputation to the Central government, in Delhi, he was instrumental in drafting the liberating 73rd and 74th Constitutional Amendments.

He argues that devolution of powers, not in a cosmetic manner but in reality, to the ground level, is the larger principle and objective of any functional democracy. He stresses that public participation in government, making the members of the public responsible for governance is the trend all across in India, implying this has not happened in J&K. Or that it has happened in Jammu and Kashmir to a far lesser degree than elsewhere, due to its separate constitutional framework, something that happened because of Article 370.

He says the idea behind the 73rd and 74th Constitutional Amendments is to enable and empower the ordinary citizens in an unprecedented manner. The aim is to make each citizen of the country a legislator, someone whose inputs are factored in while framing the laws of the land. This was envisaged through the instrumentality of the gram sabha at the lowest level of village in the rural set-up and municipalities in the urban habitations.

The aim and objective of the 73rd and 74th Amendments is to take governance to the grassroots and make democracy more participatory and therefore deeper and more meaningful. Broadly, the flow of power(s) is from the Centre to the State and from the State to the local (village or municipality) level in the three-tier or levels of governance as defined in the Indian system of governance with the Central government being the most powerful instrument. This leads to a top down approach and cannot be very democratic. In contrast, the flow of powers should be from bottom to top to make it more meaningful and

relevant to the needs of the people at the grassroots level, he stresses.

He laments that the regularity of elections is something guaranteed in 73rd Amendment but this has not happened in J&K. He says that the financial powers of panchayats need to be decided more clearly and without enabling provisions, panchayats will remain powerless.

Success or failure of panchayats lies in projecting the aspirations of the people they represent. Since this is not happening in Jammu and Kashmir because of non-applicability of 73rd Amendment, there is sense of discontentment amongst the masses as also the elected panchayat members.

In an ideal or model situation, gram sabhas should be able to take everybody on board while formulating priorities and plans for development. Also, community assets should also vest in a decentralized manner with the institutions of self-governance i.e. panchayats and urban local bodies. Plans for the state should be created on the basis of the inputs from the districts which in turn should be guided by the inputs from the blocks and the blocks should take inputs from the panchayats and the gram sabhas. All these attributes of a functional and robust three-tier panchayati raj system are missing in Jammu and Kashmir.

In conclusion, we can say that Article 370 stands in the way of effective and constitutionally guaranteed democratic decentralization of powers in Jammu and Kashmir. The State's Panchayats and Urban Local Bodies have less financial and administrative powers than those compared to other States of India. The disempowerment of these panchayat and ULBs means

Jammu and Kashmir manages to spend less than its budget allocations given to rural as also urban sectors.

Also, another important issue needs to be taken into account here while summing up the functioning of the panchayats and ULBs. Jammu and Kashmir being a multi-ethnic, multi-cultural, multi-lingual and multi-religious society, there is need for decentralization and devolution of powers to involve all sections of the society into governance. This will help make them stake-holders in the planning and execution processes and give them a sense of fulfillment.

Lack of decentralization and disempowerment of the panchayats and the ULBs is leading to a situation where Jammu and Ladakh regions are constantly challenging the alleged hegemony of the Kashmir Valley politicians and their discourse. The lack of decentralization means the component units of the state are working against each other, instead of working with each other, to maintain the unity of the state. Therefore, for maintaining the unity of the state, it is important that decentralization is taken to the next level, and fast.

The Interlocutors appointed by the Centre and headed by Dileep Padgaonkar, in their recommendations submitted to the Central government, regarding the PRIs and ULBs clearly rooted for more decentralization and empowering of these institutions.

On page 55 of their report, the Interlocutors said: The Panchayati Raj Institutions at the level of the districts and panchayats shall be empowered on the basis of the substance of the 73rd and 74th Amendments to the Constitution of India.

Further, they also recommended that "Members of the Regional Councils and the Panchayati Raj Institutions shall be elected. However, representation would be assured for women, SCs, STs, OBCs and displaced communities through reservation of an appropriate number of seats."

We have seen that J&K has its own Panchayati Raj Act as also laws pertaining to Urban Local Bodies, different from those that are applicable in rest of the country. The politicians in J&K often talk of autonomy and special status but when it comes to panchayats and ULBs, they are not ready to empower these bodies.

This is a paradoxical situation in which the legislators of different ideologies clamor for more powers for themselves. However, when it comes to giving similar powers to panchayats and ULBs within J&K, the same set of politicians try to undercut their powers. The legislators then want far less powers for the panchayats and ULBs in J&K, as compared to the rest of the country, contrary to what they want for themselves.

In due course of time, the panchayats and ULBs in J&K are bound to get more powers as the representatives elected to them will clamour for these powers. Already, the panchayats have been demanding more and more powers for themselves and the state government is under tremendous pressure to grant these.

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CHAPTER- 9

Conclusions

THE people of Jammu and Kashmir are in a position of great disadvantage vis-à-vis their counterparts living elsewhere in India, on several issues due to the operation of Article 370. And this list is not comprehensive or exhaustive. The manner in which this Article operates and impacts them has negative consequences for them even though a section of politicians in Jammu and Kashmir claims that the Article protects their rights.

Progressive laws passed by the Parliament do not apply in Jammu and Kashmir due to Article 370. We have already seen how the Right to Information (RTI) law became applicable in other parts of India in the year 2005, and not in J&K due to Article 370.

It is another matter that this transparency law was passed, in a modified form, by the Legislative Assembly, of Jammu and Kashmir, much later, and that he state law is definitely weaker than the Central law. It was on March 20, 2009, that the Government the Jammu and Kashmir Rights to information, 2009, period, and emailed.

Talking of the Panchayati Raj Institutions (PRIs) and the Urban Local Bodies (ULBs), it needs to be stressed that the 73rd and 74th Constitutional Amendments, giving wide powers to these bodies, could not be applied to J&K due to Article 370. Till date, the PRIs and ULBs in Jammu and Kashmir are

effectively lame duck institutions due to this though these amendments were passed over two decades ago.

Throughout the country, 73rd and 74th Constitutional Amendments empowered the PRIs and ULBs and significant amounts of funds are now spent by these institutions of grassroots democracy at the third (local) level. Not so in Jammu and Kashmir due to Article 370 because these bodies are at the mercy of the legislature for devolution of funds, and they end up getting peanuts, very small amounts of funds and cannot carry out the development works at the local level.

One of the most interesting comments about Article 370 was made by Dr Javed Rahi, a Gujjar scholar, who is involved in advocacy for wider rights to be conferred on the Scheduled Tribe (ST) Gujjar-Bakerwal community which comprises over 10 per cent of the state's population. He said: We are not against Article 370, Article 370 is against us.

He was referring to the denial of political reservations to the STs in Jammu and Kashmir due to Article 370. We have already seen how the ST communities in the state are entitled to reservations in professional educational institutions and jobs. However, they have not been given any political reservation, either in the Lok Sabha or in the Legislative Assembly constituencies. The ST community also does not get benefits because many of the enabling laws passed by the Centre, particularly Forest Rights Act, 2006, are not applicable in J&K.

All the six Lok Sabha seats in Jammu and Kashmir, are general category seats and not a single constituency has been reserved for Scheduled Tribes

(ST). Similar is the case with relation to the Legislative Assembly constituencies. In the 87-member Legislative Assembly of Jammu and Kashmir, not a single seat has been reserved for the members of the Scheduled Tribes (ST). Of the 87 seats, seven are reserved for the Scheduled Castes.

This makes it clear that the benefits granted to weaker Scheduled Tribes under the Indian Constitution are denied to them in J&K due to Article 370.

Similarly, other weaker sections, like Other Backward Classes (OBCs) are also denied their due in Jammu and Kashmir under the pretext of Article 370.

These are just a few of the glaring instances of the manner in which Article 370 comes in the way of implementation of enabling provisions for weaker sections as envisaged in the Constitution of India. Article 370 is thus a barrier, an impediment in the way of emancipation of the weaker sections like STs and OBCs.

Besides, it has also created barriers in the way implementation of progressive legislations enacted by the Parliament of India. In this connection, it is pertinent to point out that the Right to Education (RTE) law passed by the Parliament is not applicable to Jammu and Kashmir. Similarly, laws like the Right to Food and several others are also not applicable to the state, again, due to Article 370.

What possible harm can the implementation of the Right to Education (RTE) do to the people of Jammu and Kashmir? The answer can only be "absolutely no chance of any harm, only gains for the masses of the state of Jammu and Kashmir". Yet, this progressive law is not applicable to Jammu and Kashmir due to

Article 370. It needs to be mentioned here that the RTE was added as Article 21 A to the Constitution of India through 86th Constitutional Amendment.

In the political domain, it is fashionable to use the word secular and non-secular. Some parties claim to be secular in their outlook condemning others as non-secular. But what is the reality of this highly contentious word which tends to, ironically, communalise the polity.

We can discuss the issue of the addition of the word *secular* to the Preamble of the Indian Constitution here. The word *secular* was added to the Preamble of the Constitution of India through 42nd Constitutional Amendment during the Prime Minister-ship of Indira Gandhi in 1975/76, during Emergency.

Due to Article 370, the word could not be added to the Preamble of the Constitution of Jammu and Kashmir then. At that time, in 1975-76, there were 54 Congress MLAs in a House of 75 in Jammu and Kashmir though the government was led by Sheikh Abdullah. However, they did not deem it necessary or expedient to add the word secular to the Preamble of the Constitution of Jammu and Kashmir.

Contrast this with the manner in which they passed the Bill extending the term of the assembly, from five to six years, which was also done through 42nd Amendment to the Constitution of India. The legislators of Jammu and Kashmir extended the term of the Legislative Assembly from five to six years but did not add the word *secular* to the Preamble of the Constitution of Jammu and Kashmir.

Through 44th Amendment to the Constitution of India, the term of the legislatures, throughout India,

was again reduced from six to five years. However, due to Article 370, this could not be applied to Jammu and Kashmir. Till date, therefore, the term of the Legislative Assembly of Jammu and Kashmir continues to be six years, in contrast to a uniform five years for all other assemblies.

Incidentally, we can take the argument about the addition of word *secular* in the context of the Preamble of the Indian Constitution further.

In 1986, the Congress and the National Conference entered into a pre-poll agreement to fight elections in Jammu and Kashmir together. In 1987, they formed a coalition government. However, the word *secular* was not added during the tenure of this government headed by Farooq Abdullah though some amendments were carried out to the Constitution of Jammu and Kashmir but the word *secular* was not added in its Preamble.

In November 2002, the Congress and the PDP formed a coalition government and carried out some constitutional amendments. In November 2005, Ghulam Nabi Azad of the Congress became the Chief Minister by replacing his coalition partner, Mufti Mohammed Sayeed.

The word *secular* was not added to the Preamble of the J&K Constitution during the tenure of Mufti Mohammed Sayeed, and then during Azad's tenure.

In January 2009, the Congress formed a coalition government with the National Conference and passed some constitutional amendments. Still, the word *secular* has not been added to the Preamble of the Constitution of Jammu and Kashmir. Article 370 has

thus effectively prevented the word *secular* from entering the Preamble of the J&K Constitution.

It bears mention here that between January 1957 and February 2013, the Constitution of Jammu and Kashmir has been amended no less than 33 times, and several changes were introduced. However, many of the enabling, progressive laws passed by the Parliament of India have not been applied to Jammu and Kashmir. These do not apply to the state due to Article 370.

It is often said that due to Article 370, people from outside the state cannot settle in Jammu and Kashmir; cannot get employment in state services; cannot be get admissions in professional colleges; are not given scholarships; cannot buy land and do not set up industries. In effect, the people from outside (Indian citizens residing in Jammu and Kashmir) can be treated, in an unequal manner, due to specific enabling provisions made for Permanent Residents of Jammu and Kashmir.

The laws clash with the Preamble of the Constitution of India, Fundamental Rights of the Constitution of India and created other such anomalies. All these and more inequities, are perpetrated because of the Article 35-A of the Constitution of India which was added to the Constitution through Constitution Application Order 1954, issued by the President of India (Dr Rajendra Prasad) under Article 370.

It needs to be stressed here that the Constitution of India can be amended using Article 368 of the Constitution. The power to amend the Constitution vests in Parliament and a Bill to amend the Constitution can only be moved in either House of

Parliament (the Lok Sabha or the Rajya Sabba). However, Article 35-A of the Constitution of India was added to the Constitution through CAO 1954, by the President, through an executive order issued under Article 370.

This effectively means that an Article (amending the Constitution?) has been added to the Constitution of India by the President through an executive order. The question that begs an answer is whether Article 370 confers legislative powers on the President of India and takes them away from Parliament, in relation to Jammu and Kashmir.

In effect, on the ground, Article 35-A leads to the citizens of India living within the boundaries of Jammu and Kashmir being treated, in an unequal manner. The reference here is to the manner in which the citizens of India (non-Permanent J&K Residents) can be denied the rights of equality guaranteed by the Constitution of India. The right of equality enshrined in the Fundamental Rights is denied to the Indian citizens.

There are, in effect, two sets of rules and laws that govern the citizens of India living in Jammu and Kashmir. The citizens of India, who are also permanent residents of Jammu and Kashmir, thus enjoy privileges and protections under Article 35-A which are denied to the citizens of India who are not permanent residents of Jammu and Kashmir.

Incidentally, the Indian Constitution is federal in character, with a unitary bias, and Article 370 leads to anomalous situations, every now and then. The anomaly being referred to herein, is the fact that the laws framed under Article 370 defining Permanent

Residents of Jammu and Kashmir, take precedence over the Constitution of India, the federal Constitution.

So, what happens is that the federal Constitution (The Constitution of India) is relegated to a secondary position and the Constitution of Jammu and Kashmir (a constituent unit of the federation of India) reigns supreme. In federal structures, it is usually the other way round. If the law of a state clashes with the federal law/s, it is the law of the federal government that prevails. But not so in J&K!

The constitutional validity, or otherwise, of the Article 35-A has not been commented upon by any of the constitutional experts, till date. Read through the commentaries on the Constitution of India by different people. They all record the fact of Article 35-A being added through a Presidential executive order. In fact, Article 35-A, till date, is not given in the body of the main text of the Constitution. It is given as an Appendix.

The convention otherwise is to add a new article and place it where it should be, next to the main article after which it is being added. Compare it to where Article 21-A is now located in the Constitution. Article 21-A is next to Article 21 in the main body of the text of the Constitution.

Why question the constitutional validity of the Article 35-A? The problem with this Article is that it was added by the President through Constitutional Application Order, 1954, issued on May 14, 1954, exercising powers under Article 370, clause 1.

The addition to an Article to the Constitution is something that needs to be closely examined. We need to ask whether adding an Article to the Constitution of

India amounts to amending the Constitution or not. And then, another question follows. This is whether the President has any legislative powers, and so wide and sweeping, that he/she can amend the Constitution? In exercise of his/her powers under Article 370, here is something (Article 35-A) that has been added by the President.

Has this addition of a new clause (Article 35-A), which per se looks like a Constitutional Amendment in every sense of the word, is something constitutional or unconstitutional? When we read the Constitution of India and its amending procedures, we have to go to Article 368 which defines the process laid down for amending the Constitution.

In case of Article 35-A, the President added a new article and through Article 370, not Article 368, which Parliament alone is entitled to do. As one reads, and reads, again and again, the Article 370 nowhere is it said that it confers legislative powers on the President of India. Article 370 talks of how the laws framed by Parliament will not be applicable to J&K, automatically. Besides, it also talks of how any of the laws passed by Parliament are to be extended to J&K, the route will have to be Article 370.

Article 370 empowers the President to apply the laws passed by the Parliament "with exceptions and modifications". It does not empower the President to legislate new laws, and takes away this power to make laws from the Parliament. The apparent anomaly being referred to here is the manner in which a new Article, Article 35-A, has been added by the President through an executive order.

May be this issue will be dissected threadbare by the legal and unconstitutional experts in the coming days as more and more of them apply themselves to it. Somehow, till date, nobody has questioned the validity of the addition of Article 35-A by the President through an executive order, as a new legislation, into the Constitution of India.

Let us consider now how Right to Education (RTE) was added to the Constitution of India. The RTE is now enshrined in the Constitution as Article 21-A. It has been added to the Constitution through an amendment (86th Amendment). This was done by the Parliament through the process laid down in Article 368. This was not something that the President did. The point being made here is that if for adding Article 21-A, a constitutional amendment had to be carried out, how is it that in case of Article 35-A, which also is a constitutional amendment, since it is the addition of a new clause, just as 21-A is, the due process of amending the Constitution as laid down in Article 368, was not followed.

If the President can add Article 35-A, and amend the Constitution(?), through Article 370, how many more constitutional amendments he/she can carry out throughout the Constitution? What are the limits on the legislative powers of the President under Article 370?

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APPENDICES- I

Maharaja Hari Singh's Letter to Mountbatten

Text Of Letter Dated October 26, 1947 From Hari Singh, The Maharaja Of Jammu & Kashmir to Lord Mountbatten, Governor General of India.

Dated: 26 October 1947

My dear Lord Mountbatten,

I have to inform your Excellency that a grave emergency has arisen in my State and request immediate assistance of your Government.

As your Excellency is aware the State of Jammu and Kashmir has not acceded to the Dominion of India or to Pakistan. Geographically my State is contiguous to both the Dominions. It has vital economical and cultural links with both of them. Besides my State has a common boundary with the Soviet Republic and China. In their external relations the Dominions of India and Pakistan cannot ignore this fact.

I wanted to take time to decide to which Dominion I should accede, or whether it is not in the best interests of both the Dominions and my State to stand independent, of course with friendly and cordial relations with both.

I accordingly approached the Dominions of India and Pakistan to enter into Standstill Agreement with my State. The Pakistan Government accepted this Agreement. The Dominion of India desired further discussions with representatives of my Government. I could not arrange this in view of the developments indicated below. In fact the Pakistan Government are operating Post and Telegraph system inside the State.

Though we have got a Standstill Agreement with the Pakistan Government that Government permitted steady and increasing strangulation of supplies like food, salt and petrol to my State.

Afridis, soldiers in plain clothes, and desperadoes with modern weapons have been allowed to infilter into the State at first in Poonch and then in Sialkot and finally in mass area adjoining Hazara District on the Ramkot side. The result has been that the limited number of troops at the disposal of the State had to be dispersed and thus had to face the enemy at the several points simultaneously, that it has become difficult to stop the wanton destruction of life and property and looting. The Mahora powerhouse which supplies the electric current to the whole of Srinagar has been burnt. The number of women who have been kidnapped and raped makes my heart bleed. The wild forces thus let loose on the State are marching on with the aim of capturing Srinagar, the summer Capital of my Government, as first step to over-running the whole State.

The mass infiltration of tribesmen drawn from distant areas of the North-West Frontier coming regularly in motor trucks using Mansehra-Muzaffarabad Road and fully armed with up-to-date weapons cannot possibly be done without the knowledge of the Provisional Government of the North-West Frontier Province and the Government of Pakistan. In spite of repeated requests made by my Government no attempt has been made to check these raiders or stop them from coming into my State. The Pakistan Radio even put out a story that a Provinsional Government had been set up in Kashmir. The people

of my State both the Muslims and non-Muslims generally have taken no part at all.

With the conditions obtaining at present in my State and the great emergency of the situation as it exists, I have no option but to ask for help from the Indian Dominion. Naturally they cannot send the help asked for by me without my State acceding to the Dominion of India. I have accordingly decided to do so and I attach the Instrument of Accession for acceptance by your Government. The other alternative is to leave my State and my people to free-booters. On this basis no civilized Government can exist or be maintained. This alternative I will never allow to happen as long as I am Ruler of the State and I have life to defend my country.

I am also to inform your Excellency's Government that it is my intention at once to set up an interim Government and ask Sheikh Abdullah to carry the responsibilities in this emergency with my Prime Minister.

If my State has to be saved immediate assistance must be available at Srinagar. Mr. Menon is fully aware of the situation and he will explain to you, if further explanation is needed.

In haste and with kind regards,

The Palace, Jammu
26th October, 1947

Yours sincerely,

Hari Singh

Appendix- II

INSTRUMENT OF ACCESSION

Instrument of Accession executed by Maharajah Hari Singh on October 26, 1947

Whereas the Indian Independence Act, 1947, provides that as from the fifteenth day of August, 1947, there shall be set up an independent Dominion known as INDIA, and that the Government of India Act 1935, shall with such omissions, additions, adaptations and modifications as the Governor General may by order specify, be applicable to the Dominion of India.

And whereas the Government of India Act, 1935, as so adapted by the Governor General, provides that an Indian State may accede to the Dominion of India by an Instrument of Accession executed by the Ruler thereof.

Now, therefore, I Shriman Inder Mahinder Rajrajeswar Maharajadhiraj Shri Hari Singhji, Jammu & Kashmir Naresh Tatha Tibbet adi Deshadhipati, Ruler of Jammu & Kashmir State, in the exercise of my Sovereignty in and over my said State do hereby execute this my Instrument of Accession and

1. I hereby declare that I accede to the Dominion of India with the intent that the Governor General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall by virtue of this my Instrument of Accession but subject always to the terms thereof, and for the purposes only of the

Dominion, exercise in relation to the State of Jammu & Kashmir (hereinafter referred to as “this State”) such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India, on the 15th day of August 1947, (which Act as so in force is hereafter referred to as “the Act').

2. I hereby assume the obligation of ensuring that due effect is given to provisions of the Act within this State so far as they are applicable therein by virtue of this my Instrument of Accession.

3. I accept the matters specified in the schedule hereto as the matters with respect to which the Dominion Legislature may make law for this State.

4. I hereby declare that I accede to the Dominion of India on the assurance that if an agreement is made between the Governor General and the Ruler of this State whereby any functions in relation to the administration in this State of any law of the Dominion Legislature shall be exercised by the Ruler of the State, then any such agreement shall be construed and have effect accordingly.

5. The terms of this my Instrument of Accession shall not be varied by any amendment of the Act or the Indian Independence Act, 1947, unless such amendment is accepted by me by Instrument supplementary to this Instrument.

6. Nothing in this Instrument shall empower the Dominion Legislature to make any law for this State authorizing the compulsory acquisition of land for any purpose, but I hereby undertake that should the Dominion for the purpose of a Dominion law which applies in this State deem it necessary to acquire any

land, I will at their request acquire the land at their expense, or, if the land belongs to me transfer it to them on such terms as may be agreed or, in default of agreement, determined by an arbitrator to be appointed by the Chief Justice of India.

7. Nothing in this Instrument shall be deemed to commit in any way to acceptance of any future constitution of India or to fetter my discretion to enter into agreement with the Government of India under any such future constitution.

8. Nothing in this Instrument affects the continuance of my Sovereignty in and over this State, or, save as provided by or under this Instrument, the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State.

9. I hereby declare that I execute this Instrument on behalf of this State and that any reference in this Instrument to me or to the Ruler of the State is to be construed as including a reference to my heirs and successors.

Given under my hand this 26th day of October, nineteen hundred and forty seven.

Hari Singh
Maharajadhiraj of
Jammu and Kashmir State

Appendix- III

Acceptance of the Accession by the Governor General of India

I do hereby accept this Instrument of Accession. Dated this twenty seventh day of October, nineteen hundred and forty seven.
Mountbatten of Burma
Governor General of India.

SCHEDULE OF INSTRUMENT OF ACCESSION

THE MATTERS WITH RESPECT TO WHICH THE DOMINION LEGISLATURE MAY MAKE LAWS FOR THIS STATE

A. Defence

1. The naval, military and air forces of the Dominion and any other armed forces raised or maintained by the Dominion; any armed forces, including forces raised or maintained by an acceding State, which are attached to, or operating with, any of the armed forces of the Dominion.
2. Naval, military and air force works, administration of cantonment areas.
3. Arms, fire-arms, ammunition.
4. Explosives.

B. External Affairs

1. External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's Dominions outside India.

2. Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India or subjects of any acceding State; pilgrimages to places beyond India.

3. Naturalisation.

C. Communications

1. Posts and telegraphs, including telephones, wireless, broadcasting, and other like forms of communication.
2. Federal railways; the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fares, station and services terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers.
3. Maritime shipping and navigation, including shipping and navigation on tidal waters; Admiralty jurisdiction.
4. Port quarantine.
5. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port Authorities therein.
6. Aircraft and air navigation; the provision of aerodromes; regulation and organisation of air traffic and of aerodromes.
7. Lighthouses, including lightships, beacons and other provisions for the safety of shipping and aircraft.
8. Carriage of passengers and goods by sea or by air.

9. Extension of the powers and jurisdiction of members of the police force belonging to any unit to railway area outside that unit.

D. Ancillary

1. Election to the Dominion Legislature, subject to the provisions of the Act and of any Order made thereunder.
2. Offences against laws with respect to any of the aforesaid matters.
3. Inquiries and statistics for the purposes of any of the aforesaid matters.
4. Jurisdiction and powers of all courts with respect to any of the aforesaid matters but, except with the consent of the Ruler of the acceding State, not so as to confer any jurisdiction or powers upon any courts other than courts ordinarily exercising jurisdiction in or in relation to that State.

Appendix- IV

STATE SUBJECT DEFINITION

(1) Notification dated the 20th of April, 1927.

No 1-L/84- The following definition of the term `State Subject' has been sanctioned by His Highness the Maharaja Bahadur (Vide Private Secretary's letter No 2354, dated the 31st January, 1927, to the Revenue Member of Council) and is hereby promulgated for general information.

The term State Subject means and includes –

Class-I. All persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Gulab Singh Sahib Bahadur, and also persons who settled therein before the commencement of Samvat year 1942 and have since been permanently residing therein.

Class-II. All persons other than those belonging to Class-I who settled within the State before the close of Samvat year 1968 and have since permanently resided and acquired immovable property therein.

Class-III. All persons other than those belonging to Classes I and II permanently residing within the State, who have acquired under a rayatnama any immovable property therein or who may hereafter execute a rayatnama after ten years continuous residence therein.

Class-IV. Companies which have been registered as such within the State and which, being companies in which the Govt are financially interested or as to the financial stability of which the

Government, are satisfied, have by a Special Order of His Highness been declared to be State Subjects.

Note-I: In matters of grant of the State scholarships, State lands, for agricultural and house building purposes and recruitment to State Service, State Subjects of Class-I should receive preference over other classes and those of Class-II, over Class-III, subject however, to the order dated 31st of January, 1927 of His Highness the Maharaja Bahadur regarding employment of hereditary State Subjects in Government Services.

Note-II: The descendents of the persons who have secured the status of any class of the State Subjects will be entitled to become the State Subjects of the same class. For example, if A is declared a State Subject of Class-II, his sons and grandsons will ipso facto acquire the status of the same class (II) and not of Class-I.

Note-III: The wife or widow of a State Subject of any class shall acquire the status of her husband as State Subject of the same class as her husband, so long as she resides in the State and does not leave the State for permanent residence outside the State.

Note-IV: For the purpose of the interpretation of the term `State Subject' either with reference to any law for the time being in force or otherwise, the definition given in this Notification as amended up to date shall be read as if such amended definition existed in this Notification as originally issued.

(2) NOTIFICATION

(Issued by Order of His Highness the Maharaja Bahadur dated Srinagar, the 27th June, 1932, 14th Har, 1939, published in Govt Gazette dated 14th Har, 1989)

No 13-L/1989– Whereas it is necessary to determine the status of Jammu and Kashmir State Subjects in foreign States as to the position of their nationals in this State, it is hereby commanded and notified for public information, as follows:

1. That all emigrants from the Jammu and Kashmir State to foreign territories shall be considered State Subjects and also the descendents of these emigrants born abroad for two generations.

   Provided that, these nationals of the Jammu and Kashmir State shall not be entitled to claim the internal rights granted to subjects of this State by the laws, unless they fulfill the conditions laid down by those laws and rules for the specific purposes mentioned therein.

2. The foreign nationals residing in the State of Jammu and Kashmir, shall not acquire the nationality of the Jammu and Kashmir State until after the age of 18 on purchasing immovable property under permission of an ijazatnama and on obtaining a rayatnama after ten years continuous residence in the Jammu and Kashmir State as laid down in Notification No.1-L of 1984, dated 20th April, 1927.

3. Certificates of nationality of the Jammu and Kashmir State may, on application, be granted by the minister in charge of the Political Department in accordance with the provisions of Section 1 of this Notification."



Sant Kumar Sharma was born in 1964. He was educated at Jammu University from where he majored in English. He studied journalism from Guru Jambeshwar University of Science and Technology, Hisar in Haryana and the Bharatiya Vidya Bhavan, Jummu. For 25 years, starting with the Indian Express, he has held senior positions with different newspapers- The Times of India, The Statesman, Nai Duniya and Dainik Bhaskar and headed the J & K bureau for Star News. Lately, he has been the Consulting Editor with The Jammu Height, a monthly magazine from Jammu.





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